RECENT AMERICAN DECISIONS.

Supreme Court of Michigan.

BABBITT v. BUMPUS.

In the absence of a special contract, an attorney is not an insurer of the result of the litigation which he undertakes. He is bound only to ordinary skill, care, intelligence and diligence, and good faith. An error for which he will be liable must be so gross as to render wholly improbable any disagreement among good lawyers as to the manner of the performance of the service in the particular instance.

In an action for his fees the attorney is a competent witness as to the value of his services and may show his knowledge and experience. He may likewise testify as to the charges of other attorneys for like services.

Evidence that the attorneys on the other side charged less than the plaintiff and that their services were of as great or greater value, is irrelevant.

Where, after a settlement procured by the attorney, a second suit is brought against the client through no fault of the attorney, evidence as to the damage sustained by the client by the bringing of the second suit, is inadmissible.

In his charge to the jury, the trial judge said: "An attorney is obliged to do the very best he can. In this case it has been done. * * * I don't think that you are warranted by the testimony in saying that B (the attorney) was in any way negligent." *Held*, error.

Error to the Circuit Court of Wayne County.

S. W. Burroughs for appellant.

Conely, Maybury & Lucking for appellee.

SHERWOOD, C. J., delivered the opinion of the Court, January 18, 1889: This action is brought by plaintiff to recover of the defendant the value of services rendered for her as attorney and counselor-at-law in the prosecution of a suit in the Circuit Court for the County of Washtenaw, in chancery, wherein Isaac N. Bumpus was complainant and Myron M. Bumpus was defendant—a partition case—for the division of eighty acres of land. The plaintiff appeared in the case for defendant and disclaimed, Myron having, before the suit was commenced, quit-claimed his interest in the land to defendant, and nothing further seems to have been done in the case. Also, for services in a suit in the Wayne Circuit Court, in chancery, wherein the defendant and Samuel R. Bumpus were complainants, and Isaac N. Bumpus was defendant, for the purpose of obtaining title to certain lands held by Isaac, who was a son of Mrs. Bumpus. The complainant's bill was dismissed on the hear-

ing, and complainant appealed to this Court and the decree was affirmed, plaintiff being their solicitor therein. See 59 Mich 95. Also, for retainer and services in a suit in the Circuit Court for the County of Washtenaw, in chancery, wherein Isaac N. Bumpus was complainant, and Mrs. Bumpus and her husband were defendants. This suit was to obtain specific performance of a contract. The defendants were beaten on the hearing, and a decree of $8,000 was rendered against Mrs. Bumpus. From this decree she appealed to this Court, and the decree was reversed, and the complainant's bill was dismissed. See 53 Mich. 346. Also, for services in a partition case, in chancery, in the Washtenaw circuit, wherein Isaac N. Bumpus was complainant, against Mrs. Bumpus and others. This case was subsequently settled. Also, for retainer and services in the case of the People against Myron M. Bumpus, informed against for the crime of murder. It is for retainer and services and disbursements in these cases that the plaintiff makes his claim against the defendant, amounting, as he presents his bill, to the sum of $2,165.25, and upon which he credits the defendant with the payment of $1,484.75, and brings his suit for the balance, being $680.50.

Defendant pleaded the general issue, and gave notice that she would show on the trial, set-off, under the common counts, to the amount of $1,635.75; and further, that such services, if rendered for the defendant, were so rendered under an agreement that the plaintiff was to have a retainer in each case, when defendant was a party, of $25, and the further sum of $25 per day for each day that the plaintiff was actually engaged in Court upon the trial and hearing of said cases, and that the retainers were to be full pay for all other services, and that she has fully performed her said agreement with the plaintiff; that the plaintiff failed and neglected to perform his agreement with her, but negligently did her business, failed to take and perfect appeals when he should have done so, and mismanaged her said business, and so improperly advised her in relation thereto as to unnecessarily cause her to pay and lay out large sums of money, which she should recoup against the plaintiff. Upon the trial of the case the plaintiff recovered a verdict for $500. The defendant brings error, basing the same

upon the rulings of the Court upon receiving the testimony (all of which appears in the record), as well as upon the charge and refusals to charge.

The plaintiff was sworn in his own behalf as to the value of his services, and the first and second errors assigned are aimed at this testimony. He was a competent witness, under our statute, for that purpose, and like all other witnesses upon that subject, was entitled to show his own experience and knowledge, and give his judgment as to the value of his services, and upon his own theory of the case, which was to the effect that there was no special agreement as to the amount he was to have for his work, but that, when he was inquired of by his client, or by those who were authorized by her to engage his services, as to what he charged, he told them his retainer was $25, and for services such sums as are stated in his bill, and it was entirely competent for him to testify as to his knowledge of the charges of other attorneys for like services in similar cases. He thereby only gave evidence of his own qualifications to speak of the value of his own services charged for, and this is always proper. And the same may be said of the witness Robinson's testimony, referred to in the eighth assignment of error, relating to the same subject. No error was committed in any of these rulings.

Thirteen assignments of error relate to the exclusion of testimony on the part of the defendant, showing that less was charged by the attorneys for the other side, in the same causes when the plaintiff was engaged for her, than was charged by the plaintiff, and that the services of the former were quite as important, and of as much, or even greater, value than were those of the plaintiff. The circuit judge did right in rejecting this testimony. The defendant's counsel might not have charged what their services were worth, or even performed them gratuitously, as is often the case where parties are unable to pay.

The Court allowed the plaintiff, in describing the services he performed for the defendant, to say that, "I had consultations with Mary Ann Bumpus, Samuel R. Bumpus, Myron Bumpus, and a great number of witnesses." Defendant moved to strike this testimony out, because such service was not specifically stated in the declaration or bill of items. This was not done.

There was no error in this ruling. The testimony descriptive of the character of the services charged for was admissible under the pleadings. It was also competent to ask the plaintiff, when on the stand, what was the amount involved in the five suits, or in any one or more of them; also the total amount charged for his services in either or all of them. The amount involved in the issue has very much to do with the value of the services rendered, and the responsibility assumed by the attorney. The Court stated the law correctly in his rulings upon these several subjects. The total amount charged was certainly competent, as the reasonableness of this was one of the questions to be passed upon by the jury, if they did not find a contract relating thereto, as claimed by either of the parties.

Six exceptions were taken by defendant's counsel to remarks made by the circuit judge which she deemed prejudicial to her case, and which it is claimed ought not to have been made. We have examined what was said on these several occasions by the circuit judge, as it appears in the record, and we do not think either of these exceptions should be sustained. A lawyer is not an insurer of the result in a case in which he is employed, unless he makes a special contract to that effect, and for that purpose. Neither is there any implied contract when he is employed in a case, or any matter of legal business, that he will bring to bear learning, skill, or ability beyond that of the average of his profession. Nor can more than ordinary care and diligence be required of him, without a special contract made, requiring it. Any other rule would subject his rights to be controlled by the vagaries and imaginations of witnesses and jurors, and not infrequently to the errors committed by courts. This the law never has done; and the fact that the best lawyers in the country find themselves mistaken as to what the law is, and are constantly differing as to the application of the law to a given state of facts, and even the ablest jurists find themselves frequently differing as to both, shows both the fallacy and danger of any other doctrine; and especially is this so as to questions of practice, the construction of statutes, and particularly those arising under our criminal and probate laws. Frequently we find the decisions of courts of last resort in the different States directly opposed to each other

upon the same questions, and resting upon the same state of facts. These all admonish courts and jurors that great care and consideration should be given to questions involving the proper service to be rendered by attorneys when they have acted in good faith, and with a fair degree of intelligence, in the discharge of their duties, when employed under the usual implied contract. Under such circumstances, the errors which may be made by them must be very gross before the attorney can be held responsible. They should be such as to render wholly improbable a disagreement among good lawyers as to the character of the services required to be performed, and as to the manner of its performance under all the circumstances in the given case, before such responsibility attaches. We find no error under either or any of these exceptions, committed in the rulings of the circuit judge upon this subject.

The next group of exceptions, numbering four, relates to the testimony given by witness Cronè. They mostly concerned the value of Babbitt's services and the manner in which he conducted the defendant's business, and certain transactions and telegrams between counsel. We have examined them all in the record, and find no fault in the judge's rulings concerning them.

The next four assignments presented by defendant, and argued, are: *First.* Referring to one of defendant's suits which was discontinued, defendant's counsel asked witness Myron Bumpus, "Did I advise you [meaning Mr. Burroughs] to discontinue it?" *Second.* "Why did your mother, through you, [Myron] take Mr. Babbitt's advice, rather than mine?" (meaning Mr. Burroughs.) *Third.* "Well, about how much will it cost you to go on with that case?" *Fourth.* "Was it not because Mr. Babbitt was your attorney of record, and because he had control of the case as such?" These questions were all put to the witness, Myron Bumpus, who, it was claimed, acted for his mother, the defendant, and were all irrelevant under the view we take of the case, and the Court committed no error in excluding the answers.

It appears, when the settlement of one of the suits occurred, Myron, who acted for his mother, requested Mr. Babbitt to so make it that it would be final as to all matters between her and Isaac Bumpus, the plaintiff. This Isaac's counsel would not

consent to, and the settlement was made without it, and Isaac brought suit again against the defendant, and about three months thereafter discontinued it. This second suit was brought in the Wayne circuit, and counsel for defendant asked Myron, when on the stand, "What was the damage you sustained by the bringing of the Wayne county suit after the settlement?" The witness was not allowed to answer, and, we think, properly so. It did not appear that it was by Babbitt's fault that the defendant was subjected to the claimed expense. This was defendant's thirty-fourth assignment of error.

We see nothing in defendant's tenth, thirty-second, or thirty-third assignments of error needing further notice. None of them can be sustained.

At the close of the trial the defendant's counsel asked the Court to instruct the jury as follows:

"(5) That Myron Bumpus, without conflict, appears to have had the management of defendant's business in all the litigation referred to in this case, for which the plaintiff seeks to recover; and that the bargain, either under plaintiff's or defendant's version, was made by and between plaintiff and Myron; and that, if the jury believe from Myron's testimony that some time after plaintiff came to Detroit in the interest of Myron in the murder case, and that this was after all the services were performed by plaintiff, and that Myron called at the office of Mr. Babbitt, and there requested the plaintiff to show his books and make a settlement, and that plaintiff refused so to do, claiming that it was unnecessary, as he (plaintiff) had looked his books over and found that he was indebted to defendant, having received enough moneys to pay him for his services, then and in such case the plaintiff cannot recover, and the verdict of the jury must be for defendant."

"(7) Plaintiff has introduced testimony tending to show the value of his services, and, if he relies upon value, rather than upon his express contract as alleged, he must stand by the actual value of his services, and must accept, under the law, such amounts as those services were reasonably worth; and if, from all the testimony in this case, the jury believe the amounts which he has received, and of which he acknowledges credits, were sufficient in amount to compensate him for his services, then and in such case he cannot recover, and the verdict of the jury must be for the defendant."

We think these requests state the law applicable to the facts in this case in terse and succinct language, and we can see no reason why they should not have been given; and their substance was really not given in the general charge, or, if it was, it was in a manner that might be easily misunderstood by the jury.

A party has the right to have the law of his case go to the jury in its plainest, simplest form; and if it is properly em-

bodied in a request in that form, prepared by counsel, and furnished to the Court, it ought to be thus given, and the request should not be ignored by the Court. We have had occasion to allude to this subject before, and when the Court declines to give such requests, it must appear that the substance of them has been as well given by the Court in its own language, or the omission will be error.

The defendant requested the Court to submit five special questions, in writing, to the jury, for their special findings, as follows:

"(1) What was the value of plaintiff's services?"

"(2) Has not defendant paid and caused to have been paid to plaintiff, sufficient amounts of money and produce to compensate him in full for his services and expenses?"

"(3) Has not defendant paid and caused to have been paid to plaintiff the following amounts, to wit: $1,484.85; credited produce admitted, $45.46; note of August 15, 1883, amounting to $150; total, $1.680.31?"

"(4) At the time plaintiff was discharged, in April or May, 1883, did not plaintiff admit to Myron that he had looked the matter all over, and that he was in defendant's debt at the time?"

"(5) Was not the bargain between plaintiff and defendant, that plaintiff was to have had $25 for each retainer, and $25 for his services each day actually engaged in the courts, and expenses, for his services?"

"*The Court.* I will decline to do that, Mr. Burroughs."

The first, second, and third of these special requests should have been submitted to the jury. They ask for the finding of questions of fact, and it was the privilege of the defendant to have them found specially.

We think when the Court said, in speaking of the duty of the plaintiff while in the service of the defendant as her attorney, "Now, an attorney is obliged to do the very best he can. In this case here, it has been done. * * * I don't think you are warranted, by the testimony, in saying that Mr. Babbitt was in any way negligent," he went too far. While these statements may not have prejudiced the rights of the defendant before the jury, it is not our privilege to say they did not. They might have done so, and such certainly was their tendency. We think it was error.

For the errors mentioned, the judgment must be reversed, and a new trial granted.

The other Justices concurred.

An attorney is liable to his client for gross negligence, or gross ignorance, in the performance of his professional duties: *Pennington* v. *Yell* (1850), 11 Ark. 212; *Evans* v. *Watrous* (1835), 2 Por. (Ala.) 205; *Montriou* v. *Jeffreys* (1825), 2 C. & P. 113; *Wilson* v. *Russ* (1841), 20 Me. 421; *Weimer* v. *Sloane* (1854), U. S. D. Ct., Dist. Ohio, 6 McLean 259; *Ex parte Giberson* (1835), U. S. C. Ct., Dist. Columbia, 4 Cranch C. C. Rep. 503; *Cox* v. *Sullivan* (1849), 7 Ga. 144; *O'Barr* v. *Alexander* (1867), 37 Id. 195; *Holmes* v. *Peck* (1849), 1 R. I. 242; *Wilcox* v. *Plummer* (1830), 4 Pet. (29 U. S.), 172; *Wynn* v. *Wilson* (1855), U. S. C. Ct. Dist. Ark., Hemp. 698; *Bowman* v. *Tallman* (1864), 27 How. Pr. (N. Y.) 212; *Gambert* v. *Hart* (1872), 44 Cal. 542; *Gallaher* v. *Thompson* (1833), Wright, Chan. (Ohio) 466; *Stevens* v. *Walker* (1870), 55 Ill. 151; *Watson* v. *Muirhead* (1868), 57 Pa. 161.

Gross Negligence Defined.

The want of ordinary skill and care and reasonable diligence, is, in the case of an attorney, gross negligence; *Pennington* v. *Yell* (1850), 11 Ark. 212.

Hence, where a client has suffered damage through the gross negligence, or gross ignorance, of his attorney, he has a right of action against him for the damages sustained: *Hopping* v. *Quin* (1834), 12 Wend. (N. Y.) 517; *Estate of A. B.* (1866), 1 Tuck. (N. Y.) 247; *Hatch* v. *Fogerty* (1871), 10 Abb. Prac. N. S. (N. Y.) 147: *Eggleston* v. *Boardman* (1877), 37 Mich. 14; *Morrill* v. *Graham* (1864), 27 Tex. 646; *Sevier* v. *Holliday* (1840), 2 Ark. 512; *Palmer* v. *Ashley* (1840), 3 Id. 75; *Wilson* v. *Russ* (1841), 20 Me. 421; *Evans* v. *Watrous* (1835), 2 Por. (Ala.) 205; *O'Barr* v. *Alexander* (1867), 37 Ga. 195; *Caverly* v. *McOwen* (1878), 123 Mass. 574; *Gleason* v. *Clark* (1828), 9 Cow. (N. Y.) 57; *Wilson* v. *Coffin* (1848), 2 Cush. (Mass.) 316; *Hastings* v. *Halleck* (1859), 13 Cal. 203; *Nisbet* v. *Lawson* (1846), 1 Ga. 275; *Cox* v. *Sullivan* (1849), 7 Id. 144; *Holmes* v. *Peck* (1849), 1 R. I. 242; *Suydam* v. *Vance* (1840), U. S. C. Ct. Dist. Ind., 2 McLean 99; *Morrill* v. *Graham* (1864), 27 Tex. 646; *Reilly* v. *Cavanaugh* (1868), 29 Ind. 435; *Mardis* v. *Shackleford* (1842), 4 Ala. 493; *Walker* v. *Scott* (1853), 13 Ark. 644; *Stevens* v. *Walker* (1870), 55 Ill. 151; *Chase* v. *Heaney* (1873), 70 Id. 268.

In *Godefroy* v. *Dalton* (1830), 6 Bing. 467; 4 Moo. & P. 149, TINDAL, C. J., explained the rule of an attorney's liability with much clearness: "It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a case, is bounded; or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia*, or *lata culpa*, mentioned in some of the cases, for which he is undoubtedly responsible. The cases, however, appear to establish, in general, that an attorney is liable for the consequences of ignorance or non-observance of the rules of practice; for want of care in the preparation of the cause for trial, or of attendance thereon, with his witnesses; and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. But, on the other hand, he is not answerable for error in judgment, upon points of new occurrence, or of nice and doubtful construction, or of such as are usually entrusted to men in the higher branch of the profession of the law."

And in an American case (*Bowman* v. *Tallman* (1864), 27 How. Pr. (N. Y.) 274, it is said: "There is no implied agreement in the relation of counsel and client, or in the employment of

the former by the latter, that the former will guarantee the success of his proceedings in a suit, or the soundness of his opinions, or that they will be ultimately sustained by a court of last resort. * * * He only undertakes to avoid errors which no member of his profession, of ordinary prudence, diligence and skill, would commit. * * * It is not enough that doubts may be raised of the soundness of his opinions or correctness of his course, unless they are accompanied by the absence of all reasonable doubts of the propriety of an opposite course or opinion in the mind of every member of his profession of ordinary skill, sagacity, and prudence, caused by a decisiveness of reason and authority in its favor."

Counsel and Attorneys.

In England, while attorneys are responsible to their clients for negligence, counsel and barristers are not. In the United States this distinction does not exist: *Story on Agency*, § 24, note. The negligence of the client does not affect the liability of the attorney: *Cox* v. *Sullivan* (1849), 7 Ga. 144.

Mistakes of Law.

An attorney is not liable for a mistake in a point of law which is in doubt, or for a wrong construction of a doubtful statute: *Morrill* v. *Graham* (1864), 27 Tex. 646; *Crosbie* v. *Murphy* (1858), 8 Ir. C. L. 301; *Elkington* v. *Holland* (1842), 9 M. & W. 659; *Bulmer* v. *Gilman* (1842), 4 M. & G. 108. He cannot be charged with negligence, where he accepts as a correct exposition of the law, a solemn decision of the Supreme Court of the State: *Marsh* v. *Whitemore* (1874), 21 Wall. (88 U. S.) 178; *Hastings* v. *Halleck* (1859), 13 Cal. 203. An error of judgment upon a doubtful question of the construction of a statute is not evidence of a want of skill or of negligence: *Caverley* v. *McOwen* (1878), 123 Mass. 574; *Bulmer* v. *Gilman*, *supra*.

Where a father, whose minor son had received injuries through the negligence of a third party, employs counsel to sue him for damages, no legal obligation is, in the absence of an express understanding, imposed on such counsel, to bring suit in the name of the father, as well as in that of the son: *Youngman* v. *Miller* (1881), 98 Pa. 196.

Conveyancing.

In examining titles to real estate and making abstracts, one impliedly undertakes that he possesses the requisite knowledge and skill, and will use due and ordinary care in the performance of the duty; and for a failure in either of these respects, resulting in damages, the party injured is entitled to recover: *Chase* v. *Heaney* (1873), 70 Ill. 268; *Rankin* v. *Schaefer* (1877), 4 Mo. App. 108. He cannot set up, in defence to an action for damages for his negligence in overlooking a lien, that such lien was erroneous or of doubtful validity: *Gilman* v. *Hovey* (1858), 26 Mo. 280.

An attorney employed to record a mortgage, but who neglects to do so until after other subsequent incumbrances have been recorded, is liable immediately to the mortgagee for all the damages which are likely to be sustained by his default: *Miller* v. *Wilson* (1854), 24 Pa. 114. But where a person, having title papers to land placed in his hands as agent and attorney, with authority to effect a sale of the land, entrusted the papers to a third person for examination and with a view of making a sale to him, and the party so entrusted with the papers, being charged with some crime, absconded and took the papers with him, it was held that this act of the agent, which resulted in a loss of the papers, was not negligence on his part, so as to impose any liability

on him therefor: *Stanberry* v. *Moore* (1870), 56 Ill. 472.

An attorney, who is also a notary public, is liable for neglect in not recording a mortgage which he had drawn for his client and agreed to deliver to the recording officer: *Stott* v. *Harrison* (1880), 73 Ind. 17.

An attorney, employed to draw a building contract, is not liable for not filing the contract so as to prevent liens from attaching: *Fenaille* v. *Coudert* (1882), 44 N. J. L. 286. A conveyancer is not liable for passing a title with an incumbrance, when, in his opinion, the incumbrance was not legally a lien, though it turns out otherwise. In *Watson* v. *Muirhead* (1868), 57 Pa. 161, the Court say: "The business of a conveyancer is one of great importance and responsibility. It requires an acquaintance with the general principles of the law of real property and a large amount of practical knowledge, which can only be derived from experience. In England, it has been pursued by lawyers of the greatest eminence. As our titles become more complex, with the increase of wealth, and the desires which always accompany it, to continue it in our name and family as long as the law will permit, it will become more and more necessary that gentlemen prepared by a course of liberal education and previous study, should devote themselves to it. There have been, and still are, such among us. The rule of liability for errors of judgment, as applied to them, ought to be the same as in the case of gentlemen in the practice of law or medicine. It is not a mere art, but a science. 'That part of the profession,' said Lord MANSFIELD, 'which is carried on by attorneys, is liberal and reputable, as well as useful to the public, when they conduct themselves with honor and integrity; and they ought to be protected, when they act to the best of their skill and knowledge. But every man is liable to error; and I should be very sorry that it should be taken for granted that an attorney is answerable for every error or mistake. * * * * A counsel may mistake, as well as an attorney. Yet, no one will say that a counsel, who has been mistaken, shall be charged. * * * Not only counsel, but judges, may differ, or doubt, or take time to consider. Therefore an attorney ought not to be liable in case of a reasonable doubt: *Pitt* v. *Yalden* (1767), 4 Burr. 2060.' The rule declared by Lord MANSFIELD has been followed in all the subsequent cases. 'No attorney,' said C. J. ABBOTT, 'is bound to know all the law. God forbid that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law; or that an attorney is to lose his fair recompense, on account of an error, being such an error as a cautious man might fall into:' *Montriou* v. *Jefferys* (1825), 2 C. & P. 113."

Ignorance of Practice.

[Hence, where an attorney produced the prothonotary's book in evidence, instead of the record of a judgment, and his case was therefore nonsuited, the attorney was not liable, because negligence had been the gist of the action, and the judgment was only alleged as the consequence of that negligence: *Godefroy* v. *Dalton* (1830), 6 Bing. 460.

But an attorney is liable for mistakes of well-known principles and rules of law: *Goodman* v. *Walker* (1857), 30 Ala. 482; *Morrill* v. *Graham* (1864), 27 Tex. 646; as that a note is not due until the expiration of the three days of grace, and cannot be sued on before that: *Hopping* v. *Quinn* (1834), 12 Wend. (N. Y.) 517. In *Goodman* v. *Walker*, STONE, J., said: "I lay down the rule, then, for the determination of this case as follows: If the law govern-

ing the bringing of this suit was well and clearly defined, both in the text books and in our decisions, and if the rule had existed and been published long enough to justify the belief that it was known to the profession, then a disregard of such rule by an attorney-at-law renders him accountable for the losses caused by such negligence or want of skill; negligence, if, knowing the rule, he disregarded it; want of skill, if he was ignorant of the rule." So the disregard of a plain statutory provision is negligence for which the attorney is liable: *Caverly* v. *McOwen* (1878), 123 Mass. 575; *Estate of A. B.* (1866), 1 Tuck. (N. Y.) 247.

Assent of Client to Ignorance of Attorney.

[Where an attorney for a defendant paid the amount of the judgment against his client, to the clerk of the Court, with the assent of his client, who also knew that the judgment creditor had not been paid by the clerk; and such payment did not operate as a satisfaction of the judgment; and the clerk, after nine or ten months' further incumbency in his office, died insolvent: the Court held that the attorney was acting merely as agent, and not as a professional man, and there being entire good faith, there could not be any recovery against such agent. "Especially should this be so, where, as here, the principal is guilty of negligence after having been directly put upon inquiry. When the appellee was informed, as he was at least twice, that the judgment creditor had not received the money, he ought to have taken some steps to see that it reached her:" ELLIOTT, C. J., p. 230.

[Otherwise the attorney would have been liable; for the same judge said: "It is the duty of a lawyer to know whether public matters, such as the duties of the officers connected with the court in which he practices, are regulated by the statute. A lawyer who does not know whether the duties of the clerk of the court, in which his professional duties are performed, are, or are not, defined by statute, cannot be deemed to possess competent skill. It is a lawyer's duty to know the elementary rules of law upon familiar matters of practice, as well as the settled rules governing matters which spring out of the ordinary transactions of every-day life, and which are of frequent application. A rudimental knowledge of the law would have acquainted the appellants' intestate with the elementary rule, that payment must be made to the creditor, or to some one duly authorized to act for him. A rule so long settled, and so familiar, ought to be known to all who assume the character of lawyers. A knowledge of the statutes would have shown the intestate that there was, in them, no provision changing the familiar and long established rule. It must be held that if the intestate was the appellee's attorney when he paid the money to Edsall [the court clerk], and paid it as his attorney, a right of action accrued to the appellee [the client and judgment debtor], because competent skill was either not possessed, or was not exercised:" Id. 227–8.

Drawing Papers and Pleadings.

The attorney is liable for mistakes negligently made in drawing papers and pleadings: *Reilly* v. *Cavanaugh* (1868), 29 Ind. 435; *Oldham* v. *Sparks* (1866), 28 Tex. 425; *Fitch* v. *Scott* (1839), 3 How. (Miss.) 314; *Watson* v. *Muirhead* (1868), 57 Pa. 161; as for suing for twelve dollars instead of twelve hundred: *Varnum* v. *Martin* (1834), 15 Pick. (Mass.) 440. But he cannot be held liable for his mistake in misdescribing land on which he was employed to enforce his client's lien, if, notwithstanding, it does not appear that

his client has sustained damage: *Joy* v. *Morgan* (1886), 35 Minn. 184.

Prosecution of Suit.

It is negligence in an attorney to bring an action too soon: *Hopping* v. *Quin* (1834), 12 Wend. (N. Y.) 517, or to neglect to bring it until too late to recover: *Smedes* v. *Elmendorf* (1808), 3 Johns. (N. Y.) 185; *Oldham* v. *Sparks* (1866), 28 Tex. 425; *Stevens* v. *Walker* (1870), 55 Ill. 151.

Also, to bring suit in the wrong county: *Kemp* v. *Burt* (1833), 4 B. & Ad. 424; or, in a court which has not jurisdiction of the suit: *Williams* v. *Gibbs* (1836), 5 Ad. & E. 208; or, to improperly dismiss a suit: *Walpole* v. *Carlisle* (1869), 32 Ind. 415; *Coopewood* v. *Baldwin* (1852), 25 Miss. 129; or, to neglect to prosecute a motion for a new trial whereby it is not finally awarded to his client: *Drais* v. *Hogan* (1875), 50 Cal. 121.

It is the duty of the attorney, employed to collect a debt, to sue out all the necessary process to enforce the claim, and for a failure to do so, he is liable to the client: *Crooker* v. *Hutchinson* (1824), 2 D. Chip. (Vt.) 117; *McWilliams* v. *Hopkins* (1834), 4 Rawle (Pa.) 382; *Fitch* v. *Scott* (1839), 3 How. (Miss.) 314; *Wright* v. *Ligon* (1824), Harp. Eq. (S.C.) 137; *Smallwood* v. *Norton* (1841), 20 Me. 83; *Cox* v. *Sullivan* (1849), 7 Ga. 144.

In *Pennington* v. *Yell* (1850), 11 Ark. 212, a leading case on the liability of the attorney, the Court say: "As authority and duty, in the relation of client and attorney, are correlative terms, in the same sense that right and obligation are so, in a general sense, it results from the law, as it now stands, that, when an attorney undertakes the collection of a debt, it becomes his duty to sue out all process, both mesne and final, necessary to effect that object; and consequently that he must not only sue out the first process of execution, but all such that may become necessary. This undoubtedly is the true general doctrine on this subject, qualified, however, as will be presently seen, by a pervading principle that fairly grows out of the peculiar character of the attorney's functions. But although it is his duty thus to pursue his client's cause through all its stages, he is not imperiously bound to institute new collateral suits, without special instructions to do so—as actions against the sheriff, or clerk, for the failure of their duty in the issuance or service of process. He should pursue bail, however, and those who may have become bound with the defendant, either before or after judgment, in the progress of the suit. Nor is he bound to attend in person to the levy of an execution, or to search out for property, out of which to make the debt; this is the business of the sheriff. Nor is he liable for any of the shortcomings of that officer. But, in reference to all these professional duties, the courts have recognized a principle to which we have already alluded, that does not, by any means, move the line between reasonable diligence and *crassa negligentia*, and thus in fact place the attorney further from responsibility to his client; but so far as its operation is in any sort to his protection, it is so only by its influence upon the determination of the question of fact, whether or not the act, or omission, complained of, did really amount to that degree of crassitude for which the law holds him liable. The principle is, that the attorney will always be justified in ceasing to proceed with his client's cause (unless specially instructed to go on) whenever he shall be *bona fide* influenced to this course by a prudent regard for the interest of his client: *Crooker* v. *Hutchinson* (1824), 2 D. Chip. (Vt.) 117; 2 Greenl. Ev., § 145. This principle would seem to grow

directly out of the peculiar character of the functions of an attorney-at-law, and to be founded on sound public policy. For, in the nature of things, these duties cannot in general be performed in a manner to subserve the true interest of the client, if limited to that strict line of routine conduct which is chalked out by the law as the pathway for ordinary agents, and it is therefore inevitable that, in the discharge of these duties, they must be intrusted with a large and liberal share of discretion."

So, an attorney is liable for a failure to seasonably sue out a *scire facias* where the execution has been returned *non est inventus*: *Dearborn* v. *Dearborn* (1818), 15 Mass. 316; for not delivering an execution to the officer within thirty days after judgment, if an attachment is lost thereby: *Phillips* v. *Bridge* (1814), 11 Id. 242.

Where an attorney employed to prosecute a suit for the recovery of valuable land, when a jury had returned a verdict in his favor, took the same, and by his negligence and unskillfulness altered the verdict so as to include only a worthless piece of the property sought to be recovered, and, at his request, the jury accepted the same as their verdict, to the plaintiff's damage, it was held that he was liable: *Skillen* v. *Wallace* (1871), 36 Ind. 319. Where an attorney was employed to conduct a case in the district court, and a judgment was rendered against his client, and he was entitled to a new trial, and obtained one, but conducted the proceedings, in obtaining the new trial, so carelessly and negligently that the order granting the same was reversed in the Supreme Court, it was held that he was liable to the client for the loss sustained thereby, and his liability was not destroyed by the fact that his client employed other counsel in the Supreme Court: *Drais* v. *Hogan* (1875), 50 Cal. 121. But he is not liable for the loss of papers stolen from him, without negligence on his part: *Hill* v. *Barney* (1848), 18 N. H. 607.

He is not guilty of negligence in forbearing to bring a suit, where the parties had agreed to leave one of the matters in dispute to arbitration, the decision of which would render an action unnecessary: *Hogg* v. *Martin* (1835), Riley (S. C.) 156; nor in failing to pursue the extraordinary remedy of attachment, the owner of the claim having neither made affidavit nor given bond: *Foulks* v. *Falls* (1883), 91 Ind. 315; nor for omitting to defend a suit, if not instructed in the defence: *Benton* v. *Craig* (1830), 2 Mo. 198; nor is he liable for a failure to file a note, which he has received for collection by suit, as a claim against the estate of the maker, upon the death and declaration of the insolvency of the estate of the latter, when said facts occurred after he received the note and without his knowledge: *Stubbs* v. *Beene* (1861), 37 Ala. 627. Where an attorney is directed to collect a note containing no waiver of the appraisement laws, and obtains a judgment with such waiver, the client cannot complain, although the debtor's property sold for much less than its value, and the whole amount of the judgment was not realized: *Nickless* v. *Pearson* (1882), 81 Ind. 427. Where a demand against persons known to be insolvent, was left with an attorney, with instructions to do the best he could with it, and he received the notes of third persons for the debt, but, in consequence of the fraud of the debtors, such notes were not collected, it was held that he was not responsible fo. the loss: *Wright* v. *Ligon* (1824), 1 Harp. Eq. (S. C.) 137.

Giving Advice.

An attorney is liable where he gives to the client plainly erroneous advice, from which the client, by following, is

damaged: *Gihon* v. *Albert* (1838), 7 Paige (N.Y.) 278.

Negligence a Question of Fact.

Whether the conduct of an attorney in a particular case, is or is not gross negligence, is a question to be determined in each case by the jury, on the evidence: *Walker* v. *Goodman* (1852), 21 Ala. 647; *Pennington* v. *Yell* (1850), 11 Ark. 212; *Dearborn* v. *Dearborn* (1818), 15 Mass. 316; *Waldpole* v. *Carlisle* (1869), 32 Ind. 415.

In California, however, the facts being ascertained, the question of negligence is one of law for the Court: *Gambert* v. *Hart* (1872), 44 Cal. 542.

Failure to Follow Instructions.

The attorney must follow the instructions of his client. "Whenever an attorney disobeys the lawful instructions of his client, and a loss ensues, for that loss the attorney is responsible:" *Gilbert* v. *Williams* (1811), 8 Mass. 51; *Nare* v. *Baird* (1859), 12 Ind. 318; *Wilcox* v. *Plummer* (1830), 4 Pet. (29 U. S.) 172; *Cox* v. *Livingston* (1841), 2 W. & S. (Pa.) 103; *Armstrong* v. *Craig* (1854), 18 Barb. (N. Y.) 387.

Thus, where the holder of a note places it in the hands of an attorney and instructs him to bring suit on it, but the attorney honestly believing that it would be better not to sue then, omits to do so, and the money is lost by the maker's subsequent insolvency, the attorney is liable to an action by the client: *Cox* v. *Livingston* (1841), 2 W. & S. (Pa.) 103.

As to the general conduct of the suit, the attorney acts according to his judgment and discretion; in these matters the client has no right to control him; he may do what he thinks is proper, even though against the wishes of the client: *Anonymous* (1828), 1 Wend. (N. Y.) 108; *Read* v. *French* (1863), 28 N. Y. 285.

Special Agreements.

Where the plaintiff handed to certain attorneys claims against a bankrupt, "to file against the estate and to obtain any dividend that he may be allowed on the same," it was held that this did not show a special contract to resist the bankrupt's discharge, and that the attorneys were entitled to use their discretion in withdrawing such resistance: *Bennett* v. *Phillips* (1881), 57 Iowa 174. A contract by an attorney, to save his client harmless from all responsibility in a suit pending against him, or to refund his fee, conceding it to be valid, extends only to such liabilities as the law would recognize or enforce; and if the client suffers a judgment to be rendered against him, in favor of another attorney, whom he never had employed for professional services in the same suit, he cannot resort to his contract of indemnity: *Lindsey* v. *Jones* (1853), 23 Ala. 835.

Liability for Mistakes or Frauds of Agents or Associates.

An attorney is liable for the negligence or fraud of another attorney whom he employs as his agent: *Riddle* v. *Poorman* (1831), 3 P. & W. (Pa.) 224; *Poole* v. *Gist* (1827), 4 McCord (S. C.) 259; *Walker* v. *Sterrns* (1875), 79 Ill. 193; *Smallwood* v. *Norton* (1841), 20 Me. 83; *Pollard* v. *Rowland* (1826), 2 Blackf. (Ind.) 22; *Grayson* v. *Wilkinson* (1845), 5 S. & M. (Miss.) 268; *Birbeck* v. *Stafford* (1862), 14 Abb. Pr. (N. Y.) 285; *Cummins* v. *Heald* (1880), 24 Kan. 600.

So, each partner in a firm of attorneys, is liable for the want of skill or negligence of the others: *Livingston* v. *Cox* (1847), 6 Pa. 360; *Dwight* v. *Simon* (1849), 4 La. An. 490; *Poole* v. *Gist* (1827), 4 McCord (S. C.) 259: *Wilkinson* v. *Griswold* (1845), 12 S. & M. (Miss.) 669.

For like reasons, a mercantile col-

lecting agency, receiving a note "for collection," is liable for the negligence of attorneys or agents employed by them in other parts of the country. In *Bradstreet* v. *Everson* (1872), 72 Pa. 124, AGNEW, J., said: "It is argued, notwithstanding the express receipt 'for collection,' that the defendants did not undertake for themselves to collect, but only to remit to a proper and responsible attorney, and made themselves liable only for diligence in correspondence, and giving the necessary information to the plaintiffs; or, in briefer terms, that the attorney in Memphis was not their agent for the collection, but that of the plaintiffs only. The current of decision, however, is otherwise, as to attorneys-at-law sending claims to correspondents for collection, and the reasons for applying the same rule to collection agencies are even stronger. They have their selected agents in every part of the country. From the nature of such ramified institutions we must conclude that the public impression will be, that the agency invited customers on the very ground of its facilities for making distant connections. It must be presumed from its business connections at remote points, and its knowledge of the agents chosen, the agency intends to undertake the performance of the service which the individual customer is unable to perform for himself. There is good reason, therefore, to hold that such an agency is liable for collections made by its own agents, when it undertakes the collection by the express terms of the receipt. If it does not so intend, it has it in its power to limit responsibility by the terms of the receipt. An example of this limited liability is found in the case of *Bullitt* v. *Baird* (*infra*), decided at Philadelphia in 1870; the only case in this State upon the subject of such agencies. There the receipt read, 'For collection according to our direction, and proceeds, when received by us, to be paid over to King and Baird.' Across the face of the receipt was printed these words: 'N. B. The owner of the within mentioned, taking all the risks of the mail, of losses by failure of agents to remit, and also of losses by reason of insurrection or war.' The limitation of the liability of Bullitt & Fairthorn, by Mr. Bullitt, himself a good lawyer, is evidence of his belief that a greater liability would arise without the restriction."

[This was affirmed in *Morgan* v. *Tener* (1877), 81 Pa. 305.

An attorney, who has collected money for his client, will, if he deliver it to a third person to carry to his client, without authority, or directions, from the client to do so, be liable to his client for the sum thus collected, if the same be stolen from such third person while on his way with the money, even though such person were trustworthy and took the same care of the money that he did of his own: *Grayson* v. *Wilkinson* (1845), 5 S. & M. (Miss.) 268. But where an attorney directed by a mortgagee of certain horses and harness, to take possession of them under the mortgage, went with an officer to the stable where they were and took possession of them, and the stable was then leased from the mortgagor and a custodian selected by the mortgagee was placed in charge of the property, it was held that the attorney was not liable for the custodian's neglect in permitting the property to be afterwards seized under an execution: *Gaines* v. *Becker* (1880), 7 Bradw. (Ill.)

Acting Without Authority.

If an attorney commence, or defend, an action, or suit, without authority, he is liable to the principal for damages: *Gilbert* v. *Williams* (1811), 8 Mass. 31; *Cyphert* v. *McClune* (1853), 22 Pa. 195; *O'Hara* v. *Brophy* (1863), 24 How. Prac. (N. Y.) 379; *Piggott* v.

23 Cal. 127; *Quin* v. *Weatherbee* (1871),41 Id. 247; *Dibble* v. *Truluck* (1868), 12 Fla. 185; *Burton* v. *Wiley* (1854), 26 Vt. 430; *Farmers' Co.* v. *Walworth Bk.* (1868), 23 Wis. 249; *Burton* v. *Hynson* (1853), 14 Ark. 32; *Austin* v. *Nelson* (1877), 11 Mo. 192; *Kerby* v. *Chadwell* (1847), 10 Id. 392; *Gehrke* v. *Jod* (1875), 59 Id. 522; *Biebinger* v. *Taylor* (1876), 64 Id. 63; *Spaulding* v. *Thompson* (1859), 12 Ind. 477; *Merritt* v. *Putnam* (1862), 7 Minn. 493; *Babcock* v. *Brown* (1853), 25 Vt. 550; *Jones* v. *Leech* (1877), 46 Iowa 186; *Matthis* v. *Cameron* (1876), 62 Mo. 504; *Niagara Ins. Co.* v. *Rodecker* (1877), 47 Iowa 162.

So, a party to a suit, cannot plead the neglect of his counsel as an excuse for his own negligence, where he is capable of acting in the matter for himself and by himself: *Boing* v. *Raleigh & G. R. Co.* (1883), 88 N. C. 62. In New York it has been held that a judgment obtained by default through the neglect of the defendant's attorney, will be set aside, when it appears that the attorney is insolvent and the client otherwise would be remediless: *Meacham* v. *Dudley* (1831), 6 Wend. (N. Y.) 514; *Elston* v. *Schelling* (1868), 7 Robt. (Id.) 74; *Sharp* v. *Mayor* (1860), 31 Barb. (Id.) 578, and *Grill* v. *Vernon* (1871), 65 N. C. 76.

Measure of Damages.

The client must have suffered an injury, or he cannot maintain an action, even for nominal damages: *Grayson* v. *Wilkinson* (1845), 5 S. & M. (Miss.) 268; *Suydam* v. *Vance* (1840), U. S. Cir. Ct., Dist. Ind., 2 McLean 99; *Harter* v. *Morris* (1869), 18 Ohio 492; *Arnold* v. *Robertson* (1870), 3 Daly (N. Y.) 298; *Bruce* v. *Baxter* (1881), 7 Lea (Tenn.) 477.

"Two things are to be shown in order to subject an attorney to an action: (1) Gross or unreasonable negligence or ignorance, and (2) A consequent loss to his client:" *Fitch* v. *Scott* (1839), 3 How. (Miss.) 314.

The measure of damages is the actual loss sustained: *Pennington* v. *Yell* (1850), 11 Ark. 212; *Stevens* v. *Walker* (1870), 55 Ill. 151; *Rootes* v. *Stone* (1831), 2 Lea (Tenn.) 650; *Crooker* v. *Hutchinson* (1824), 2 D. Chip. (Vt.) 117; *Nisbet* v. *Lawson* (1846), 1 Ga. 275; *Cox* v. *Sullivan* (1849), 7 Id. 144; *Mardis* v. *Shackleford* (1842), 4 Ala. 493; *Eccles* v. *Stephenson* (1814), 3 Bibb (Ky.) 517; *Arnold* v. *Robinson* (1870), 3 Daly (N. Y.) 298; *Suydam* v. *Vance* (1840), U. S. Circ. Ct., Dist. Ind., 2 McLean 99; *Grayson* v. *Wilkinson* (1845), 5 S. & M. (Miss.) 268; *Langmade* v. *Glenn* (1876), 57 Ga. 525. It is not necessarily the amount of the claim which was not recovered through the negligence of the attorney: *Eccles* v. *Stephenson*, *Crooker* v. *Hutchinson*, *Cox* v. *Sullivan*, just cited. The client must show that he had a valid claim: *Spiller* v. *Davidson* (1849), 4 La. An. 171; *Pennington* v. *Yell* (1850), 11 Ark. 212.

An attorney is liable to his client only for the proximate results of neglect in making collections. If, after the client took the business from the hands of the attorney, loss resulted from further delay of the client, or of another attorney, into whose hands the collections were given, the first attorney cannot be held responsible for such loss: *Read* v. *Patterson* (1883), 11 Lea (Tenn.) 430. An attorney liable for a debt lost by his negligence, is not liable for the loss of the evidence of the debt, and in a suit against him for such loss, he may show that the plaintiff had another remedy, which he has successfully pursued: *Huntington* v. *Rumnill* (1809), 3 Day (Conn.) 390. The amount of damages is a question for the jury: *Godfrey* v. *Jay* (1831), 5 Moo. & P. 284;

Crooker v. *Hutchinson* (1824), 2 D. Chip. (Vt.) 117; *Eccles* v. *Stephenson* (1814), 3 Bibb (Ky.) 517. That the plaintiff continued to employ him after knowing of such negligent conduct, is evidence on the question of damages: *Derrickson* v. *Cady* (1847), 7 Pa. 27.

JOHN D. LAWSON.

Supreme Court of Pennsylvania.

BULLITT ET AL. v. BAIRD.

Error to the District Court for the City and County of Philadelphia.

READ, J., May 5, 1870. The defendants received for collection from King & Baird, a claim against F. Saler, St. Louis, Missouri, for which they gave a receipt in these words:—

"Philadelphia, May 24th, 1862. Received, to be forwarded for collection according to our discretion, and proceeds, when received by us, to be paid over to King & Baird. Against F. Saler, $3490.12. (Signed) Bullitt & Fairthorne, per Theo. D. Rand."

Written across the receipt were these words: "N. B. The owner of the within mentioned taking all risks of the mail, of losses by failure of agents to remit, and also of losses by reason of insurrection or war." This, it will be recollected, was during the rebellion, and when Missouri was often made the battle ground.

The claim was duly transmitted for collection to Clark & Allen, attorneys in St. Louis, who were proved to be proper and suitable persons for the purpose. Correspondence was duly kept up, and as late as June 21st, 1864, Clark & Allen wrote [that] they had no judgment in King & Baird v. Saler. On the 23d of August, 1864, one of the plaintiffs called and reported he had heard the money had been collected. Defendants immediately wrote to Clark & Allen, who replied, and stated the money had been collected, and promising to remit. This was communicated to the plaintiffs, who read the original letter from Clark & Allen. The defendants received a letter, dated "St. Nicholas Hotel, New York, September 6th, 1864." (This was Tuesday.) "Gentlemen:—I will be in your city this or the forepart of next week. The claim of King & Baird v. Saler has been paid, *i.e.*, compromised. Yours truly, Wm. Bliss Clark."

And also another letter, dated "New York, September 13, 1864" (also Tuesday). "Gentlemen:—I will not be in your city before Thursday night. Yours truly, Wm. Bliss Clark."

He never came, and the next news was that he had fallen dead in the street in St. Louis, utterly insolvent. The witness could not recollect whether he communicated these letters to the plaintiffs, or not.

The learned Judge, in his charge to the jury, said: "So far as negligence goes, I do not see anything but this information from New York, which was not communicated. The information that he was in New York, the letters written from there, and the fact that he did not come, as promised, do not appear to have been communicated. It is for you to say if there was negligence on the part of defendants in reference to this."

This, therefore, was the only negligence, if any, and the natural question is, if this information had been communicated, would it have saved the debt due by

Clark & Allen, or any part of it? From what we know, it would probably not have saved one dollar; and, therefore, the measure of damages stated in the plaintiff's print, and affirmed by the Court, which is in these words: "And the measure of damages is the amount received by said Clark, together with interest thereon, from the date of such receipt, unless reduced by the evidence offered by the defendants," is clearly erroneous, and the fourth assignment of error is sustained.

Judgment reversed and a *venire de novo* awarded.

Court of Appeals of New York.

STONE v. DRY-DOCK, E. B. & B. RY. CO.

Where a car driver so negligently drives in a city street as to run over a child of seven years of age, the jury should find whether child was capable of exercising sufficient judgment so as to be chargeable with contributory negligence.

The Court will decide that a child of very tender years has not sufficient judgment; but, from the nature of the case, it is impossible to prescribe a fixed period when a child has such sufficient judgment as to be guilty of contributory negligence. A nonsuit, on the ground of contributory negligence, is erroneous, and judgment below (opinion in 46 Hun. 184) is reversed.

Appeal from the Supreme Court, General Term, First Department. (46 Hun. 184.)

Adolph L. Sawyer, Esq., for appellant.

Messrs. Robinson, Scribner & Bright, for defendant.

ANDREWS, J., June 4, 1889. The nonsuit was placed on the ground that an infant, seven years of age, was *sui juris*, and that the act of the child, in crossing the street in front of the approaching car, was negligence on her part which contributed to her death, and barred a recovery. We think the case should have been submitted to the jury. The negligence of the driver of the car is conceded. His conduct in driving rapidly along Canal street at its intersection with Orchard street, without looking ahead, but with his eyes turned to the inside of the car, was grossly negligent: *Mangam* v. *R. R. Co.* (1868), 38 N. Y. 455; *R. R. Co.* v. *Gladmon* (1872), 15 Wall. (82 U. S.) 401.

It cannot be asserted, as a proposition of law, that a child, just passed seven years of age, is *sui juris*, so as to be chargeable with negligence. The law does not define when a child becomes *sui juris*: *Kunz* v. *City of Troy* (1887), 104 N. Y. 344.

Infants, under seven years of age, are deemed incapable of committing crime, and, by the common law, such incapacity presumptively continues until the age of fourteen. An infant, between those ages, was regarded as within the age of possible discretion; but, on a criminal charge against an infant between those years, the burden was upon the prosecutor to show that the defendant had intelligence and maturity of judgment sufficient to render him capable of harboring a criminal intent: 1 Archb. Crim. Pr. & Pl. 11. The Penal Code preserves the rule of the common law, except that it fixes the age of twelve, instead of fourteen, as the time when the presumption of incapacity ceases: Penal Code, §§ 18, 19.

In administering civil remedies, the law does not fix any arbitrary period when an infant is deemed capable of exercising judgment and discretion. It has been said in one case that an infant, three or four years of age, could not be regarded as *sui juris*, and the same was said, in another case, of an infant five years of age: *Mangam* v. *R. R. Co., supra; Fallon* v. *R. R. Co.* (1876), 64 N. Y. 13. On the other hand, it was said in *Cosgrove* v. *Ogden* (1872), 49 N. Y. 255, that a lad, six years of age, could not be assumed to be incapable of protecting himself from danger in streets or roads; and, in another case, that a boy of eleven years of age was competent to be trusted in the streets of a city: *McMahon* v. *Mayor* (1865), 33 N. Y. 642. From the nature of the case, it is impossible to prescribe a fixed period when a child becomes *sui juris*. Some children reach the point earlier than others. It depends upon many things, such as natural capacity, physical conditions, training, habits of life, and surroundings. These, and other circumstances, may enter into the question. It becomes, therefore, a question of fact for the jury, where the inquiry is material, unless the child is of so very tender years that the Court can safely decide the fact.

The trial Court misapprehended, we think, the case of *Wendell* v. *R. R. Co.* (1883), 91 N. Y. 420, in supposing that it decided, as a proposition of law, that a child of seven years was capable of exercising judgment, so as to be chargeable with contributory negligence. It was assumed in that case, both on the trial and on appeal, that the child whose conduct was

in question was capable of understanding, and did understand, the peril of the situation, and the evidence placed it beyond doubt that he recklessly encountered the danger which resulted in his death. The boy was familiar with the crossing, and, eluding the flagman, who tried to bar his way, attempted to run across the track in front of an approaching train in plain sight, and unfortunately slipped and fell, and was run over and killed. It appeared that he was a bright, active boy, accustomed to go to school and on errands alone, and sometimes was intrusted with the duty of driving a horse and wagon, and that on previous occasions he had been stopped by the flagman, while attempting to cross the track in front of an approaching train, and had been warned of the danger. The Court held, upon this state of facts, that the boy was guilty of culpable negligence. But the case does not decide, as matter of law, that all children, of the age of seven years, are *sui juris*.

We are inclined to the opinion that, in an action for an injury to a child of tender years, based on negligence, who may or may not have been *sui juris* when the injury happened, and the fact is material, as bearing upon the question of contributory negligence, the burden is upon the plaintiff to give some evidence that the party injured was not capable, as matter of fact, of exercising judgment and discretion. This rule would seem to be consistent with the principle, now well settled in this State, that in an action for a personal injury, based on negligence, freedom from contributory negligence on the part of the party injured is an element of the cause of action.

In the present case, the only fact before the jury, bearing upon the capacity of the child whose death was in question, was, that she was a girl seven years and three months old. This, we think, did not alone justify an inference that the child was incapable of exercising any degree of care. But, assuming that the child was chargeable with the exercise of some degree of care, we think it should have been left to the jury to determine whether she acted with that degree of prudence which might reasonably be expected, under the circumstances, of a child of her years. This measure of care is all that the law exacts in such a case: *Thurber* v. *R. R. Co.* (1875), 60 N. Y. 335. The child was lawfully in the street. In attempting to

cross, she was struck by the horse on the defendant's car, and was run over and killed. The evidence would have justified the jury in finding that, when the child stepped down from the curbstone, the car was fifty or more feet away, and the distance from the curbstone to the track of the defendant's road was less than twelve feet. The child, if she saw the car, might very well have supposed that she could get over the track before the car passed. There is evidence that the speed of the car was increased at about the time the child started to cross. It would be very unjust to exact of such a child that degree of care which an adult would exercise under similar circumstances. It was, we think, for the jury to say whether the child's conduct was unusual or unnatural for a child of her years. She probably did not appreciate the rapidity of movement of the car; nor could it be expected that she would weigh the circumstances, or fully understand the danger of attempting to cross in front of the car. The negligence of the defendant's driver is conceded, and it was for the jury to judge whether the conduct of the child, in crossing the street to join another child, engaged in roller-skating on the opposite side, was characterized by any want of that degree of care which children under similar circumstances would usually exercise. There is no question in the case, of negligence on the part of the parent of the child. That point was not presented on the motion for nonsuit. The judgment should be reversed, and a new trial granted.

All concur.

The right of children to play on the sidewalk and street, is not settled.

It is nowhere disputed that children *sui juris* have as much right on the sidewalks and streets as adults, and the same may be said of children *non sui juris*, in charge of a proper person. But the right to use the sidewalks and street for the purpose of travel is quite different from the use for the purpose of play.

A careful analysis of the decisions will exhibit that there is a distinction between children *sui juris* and children *non sui juris*.

In cases of injury to children *non sui juris*, the doctrine of imputable negligence has, in some jurisdictions, been applied. In cases of injury to children *sui juris*, some courts have applied this doctrine, and others have applied the rule of contributory negligence, without regard to the doctrine of imputable negligence.

It is proposed to establish the proposition, that all children, *sui juris* or *non*

sui juris, have the right to play on the sidewalk and street, and if injury to them can be avoided by the exercise of due care, such care must be used, and for want of such care the defendant is liable, whether there was, or was not, imputable negligence, or contributory negligence.

The first obstacle to this proposition is the doctrine of imputable negligence; which is, that a child *non sui juris* has no right on the sidewalk, or street, unaccompanied by a proper person. This was first announced in *Hartfield* v. *Roper* (1839), 21 Wend. (N. Y.) 615. From the reasoning in this case, and others which follow it, especially *Mangam* v. *R. R.* (1868), 38 N. Y. 455, this doctrine is properly limited to children of "two or three years of age, or even more," who are, what may be termed, helpless, and require the care and protection of another. To this class the doctrine of *Hartfield* v. *Roper* is, that if run down or injured by a traveler, the traveler is not liable, because it was negligence in the parent for a child of this age to be on the street, and it made no difference how the child got on the street alone, it being sufficient that he was there.

In other words, a child of "two or three years or even more" on the street alone, can be run down or injured with impunity.

Now it is conceded by the courts which enforce this doctrine that a child of these years is devoid of all sense of danger; and yet the same courts approve the principle that an animal must not be thus run down, or injured, if it can be avoided by the exercise of due care. This is the law of *Davies* v. *Mann* (1842), 10 M. & W. 546 [a donkey case]; *Mayor of Colchester* v. *Brooke* (1845), 7 A. & E. (N. S.) 377 [an oyster case]; *Townsend* v. *Wathen* (1808), 9 East 277 [a dog case].

Logically, the syllogism is, that all beings and animals devoid of the sense of danger must not be injured, if it can be avoided by the exercise of due care. A child of two or three years of age is such a being, therefore, such a child must not be injured, if it can be avoided by the exercise of due care. The logic of the doctrine in *Hartfield* v. *Roper* is that a child, devoid of the sense of danger, can be run down without the exercise of due care. This doctrine is therefore illogical, and barbarous, and the proper principle is that such a child must not be injured, if it can be avoided by the exercise of due care; which is the same as stating the general and sensible rule that a defendant is liable for any injury caused by his want of due care.

The senseless judicial jugglery of *Hartfield* v. *Roper* obtains in nine States of the Union:—

California,—*Schierhold* v. *R. R.* (1871), 40 Cal. 447; *Meeks* v. *R. R.* (1878), 52 Id. 602; s. c. (1880), 56 Id. 513.

Illinois,—*Gavin* v. *Chicago* (1880), 97 Ill. 66; *Toledo, W. & W. R'y Co.* v. *Grable* (1878), 88 Id. 441; [*City of Chicago* v. *Starr* (1866), 42 Id. 174, repudiated in *City of Chicago* v. *Keefe* (1885), 114 Id. 222; *Stafford* v. *Reubens* (1885), 115 Id. 196; *City of Chicago* v. *Hesing* (1876), 83 Id. 204; *Kerr* v. *Forgue* (1870), 54 Id. 482; *Chicago, St. L. & P. R. R. Co.* v. *Welsh* (1886), 118 Id. 572.]

Indiana,—*Evansville & C. R. R. Co.* v. *Wolf* (1877), 59 Ind. 89; *Jeff. M. & Ind. R. R. Co.* v. *Bowen* (1872), 40 Id. 545; [*City of Indianapolis* v. *Emmelman* (1886), 108 Id. 530; *Mayhew* v. *Burns* (1885), 103 Id. 328.]

Kansas,—*Atch. T. & S. F. R. R. Co.* v. *Smith* (1882), 28 Kan. 541.

Maine,—*Brown* v. *E. & N. A. R'y Co.* (1870), 58 Me. 384; *Leslie* v. *City of Lewiston* (1873), 62 Id. 468; [*Stin-*

son v. *City of Gardner* (1856), 42 Id. 248; *McCarthy* v. *City of Portland* (1878), 67 Id. 167.]

Maryland,—*McMahon* v. *R. R. Co.* (1873), 39 Md. 438; *Baltimore C. P. R'y Co.* v. *McDonnell* (1875), 43 Id. 551.

Massachusetts,—*Lynch* v. *Smith* (1870), 104 Mass. 52; *Gibbons* v. *Williams* (1883), 135 Id. 333; [*Collins* v. *S. B. H. R. R. Co.* (1886), 142 Id. 301; *Blodgett* v. *City of Boston* (1864), 8 Allen (Mass.) 237; *Tighe* v. *City of Lowell* (1876), 119 Mass. 472; *Lyons* v. *Inhab. Brookline* (1876), Id. 491; *Hunt* v. *City of Salem* (1876), 121 Id. 294.]

Minnesota,—*Fitzgerald* v. *R. R. Co.* (1882), 29 Minn. 336.

New York,—*Ihl* v. *R. R. Co.* (1872), 47 N.Y. 323; *Cosgrove* v. *Ogden* (1872), 49 Id. 255; [*Kunz* v. *City of Troy* (1887), 104 Id. 344; *McGarry* v. *Loomis* (1875), 63 Id. 104; *McGuire* v. *Spence* (1883), 91 Id. 303, 306; *O'Mara* v. *R. R. Co.* (1868), 38 Id. 445; *Mangam* v. *R. R. Co.* (1868), 38 Id. 455: *Fallon* v. *R. R. Co.* (1876), 64 Id. 13; *Barry* v. *R. R. Co.* (1883), 92 Id. 289; *Thurber* v. *R. R. Co.* (1875), 60 Id. 326; *Mullany* v. *Spence* (1874), 15 Abb. Pr. N. S. (N. Y.) 319; *Pendergast* v. *R. R. Co.* (1874), 58 N. Y. 652; *Ryder* v. *The Mayor* (1884), 50 N. Y. Super. 221; *Birkett* v. *Ice Co.* (1888), 110 N. Y. 504; *Malone* v. *R. R. Co.* (1889), 51 Hun (N. Y.) 532; *Murphy* v. *Orr* (1884), 96 N. Y. 14; *Barker* v. *Savage* (1871), 45 Id. 191; *Weil* v. *Dry Dock, E. B. & B. R. Co.*, S. Ct. N. Y. City, General Term, June 28, 1889; *Henderson* v. *Knickerbocker I. Co.*, S. Ct., General Term, 1st Dept., May 24, 1889.]

The doctrine of *Hartfield* v. *Roper* has been repudiated in ten States of the Union:—

Alabama,—*Government S. R. R. Co.* v. *Hanlon* (1875), 53 Ala. 70; *Bay Shore R. R. Co.* v. *Harris* (1880), 67 Id. 6.

Connecticut,—*Bronson* v. *Town of Southburg* (1870), 37 Conn. 199; *Birge* v. *Gardiner* (1849), 19 Id. 507.

Missouri,—*Frick* v. *R. R. Co.* (1882), 75 Mo. 542; [*Donahoe* v. *R. R. Co.* (1884), 83 Id. 543.

Nebraska,—*Huff* v. *Ames* (1884), 16 Neb. 139.

Ohio,—*Bellefontaine & I. R. R. Co.* v. *Snyder* (1868), 18 Ohio St. 399; *C. C. C. & I. R. R. Co.* v. *Manson* (1876), 30 Id. 451; *Street Ry. Co.* v. *Eadie* (1885), 43 Id. 91.

Pennsylvania,—*N. Pa. R. R. Co.* v. *Mahoney* (1868), 57 Pa. 187; *P. & R. R. R. Co.* v. *Long* (1874), 75 Id. 257.

Tennessee,—*Whirley* v. *Whiteman* (1858), 1 Head (Tenn.) 610.

Texas,—*G. H. & H. Ry. Co.* v. *Moore* (1883), 59 Tex. 64; *T. M. Ry. Co. & M. N. C. Co.* v. *Herbeck* (1884), 60 Id. 602.

Vermont,—*Robinson* v. *Cone* (1850), 22 Vt. 213.

Virginia,—*Norfolk & P. R. R. Co.* v. *Ormsby* (1876), 27 Grat. (Va.) 455.

In the jurisdictions which assumed to adopt the rule in *Hartfield* v. *Roper*, subsequent decisions have so materially limited the doctrine that there does not seem to be much of it left.

In *McGarry* v. *Loomis* (1875), 63 N. Y. 104, it was announced that the doctrine of imputable negligence does not apply, if the child has not been negligent, and that children have a right to play on the sidewalk. In this case the defendant was held liable, because he was guilty of negligence in causing a pool of hot water, near the sidewalk, and so liable, irrespective of the question whether or not the parent was negligent in allowing a child, four years of age, to play on the sidewalk, knowing the existence of the pool of hot water, and that the child having the right to play on the sidewalk, it was not negligence to play

near a pool of water, because of its age it was not sensible of the danger. This case is therefore nothing more than the assertion of the major premise above stated, that a defendant is liable for injury to children devoid of the sense of danger, when that injury is caused by the defendant's want of due care, and that it was a want of due care to cause a pool of hot water near a sidewalk. As will be hereafter shown, this is the doctrine pervading the adjudications in cases of injuries to children occurring elsewhere than on the sidewalk. This principle was approved and adopted in *McGuire* v. *Spence* (1883), 91 N. Y. 306; *O'Mara* v. *R. R.* (1868), 38 Id. 445; *Mangam* v. *R. R.* (1868), 38 Id. 455; *Fallon* v. *R. R.* (1876), 64 Id. 13; *Barry* v. *R. R.* (1883), 92 Id. 289; *Thurber* v. *R.R. Co.* (1875), 60 Id. 326; *Mullany* v. *Spence* (1874), 15 Abb. Pr. N. S. (N. Y.) 319; *Pendergast* v. *R. R.* (1874), 58 N. Y. 652; *Ryder* v. *The Mayor* (1884), 50 N. Y. Super. 221; *Birkett* v. *Ice Co.* (1888), 110 N. Y. 504.

But, to be more specific, it has been held that in an action for injury to a child *non sui juris* (and, *a priori*, injury causing death), the defendant was held liable, because the engineer did not stop the train, or check its speed, upon notice of the danger to the child, which due care required, and which would have avoided the injury: *Donahue* v. *R. R.* (1884), 83 Mo. 543; *Phila. & R. R. R. Co.* v. *Long* (1874), 75 Pa. 257.

Because the defendant left water-pipe piled up in the street, so loose that the child, while playing upon them, was killed: *Stafford* v. *Reubens* (1885), 115 Ill. 196. Because the defendant caused a ditch near the sidewalk, into which the child fell and was drowned: *Chicago* v. *Hesing*, 83 Ill. 204. Because the defendant did not remove, as was its duty, a large, heavy counter, placed on the sidewalk, tilted in such a manner as to be easily thrown down: *Kunz* v. *City of Troy* (1887), 104 N. Y. 344. In this case the Court stated that a child *non sui juris* cannot be guilty of negligence, and that *sui juris* means of sufficient discretion to understand the danger. The defendant was liable because he put the counter on the street, which caused the injury, although it would not have fallen had the child not attempted to jump on it: *Kerr* v. *Forgue* (1870), 54 Ill. 482.

Because the driver of the street car was not watching for pedestrians, which was his duty: *Ihl* v. *R. R.* (1872), 47 N. Y. 317. Because the driver could have stopped the car in time to prevent the injury, had he been on the lookout, as was his duty: *Thurber* v. *R. R. Co.* (1875), 60 Id. 326. Because the driver was not sufficiently vigilant and careful, for, if he had been, "he would have seen the child in time to avoid injuring her": *Birkett* v. *Ice Co.* (1888), 110 N. Y. 504.

Because the city left the excavation unguarded and unfenced: *Ryder* v. *The Mayor* (1884), 50 N. Y. Super. 221.

Because the city did not keep the sidewalk in a reasonably safe state of repair: *City of Chicago* v. *Keefe* (1885), 114 Ill. 222, which repudiates *City of Chicago* v. *Starr* (1866), 42 Id. 174.

The converse of the position of the foregoing cases is illustrated by the following, where it was held that the defendant was not liable because he committed no negligence, or rather omitted no duty, inasmuch as the child would not have been drowned had the plaintiff repaired, or caused to be repaired, or guarded, the excavation of which he had full notice: *Mayhew* v. *Burns* (1885), 103 Ind. 343. Because the defendant was carrying on its own business upon its own property without the omission of any duty, and thus had no reason to apprehend that a child, three and one-half years of age, would come up on

its track, in such a place, and in front of a slowly moving freight: *Malone* v. *R. R.* (1889), 51 Hun (N. Y.) 532. Because the fault rested with those who had charge of the child, and the defendant was without fault: *The Burgundia* (1886), U. S. D. Ct., S. Dist. N. Y., 29 Fed. Repr. 464.

This is the principle upon which all the cases are based, except in Massachusetts and Maine, in cases against municipal corporations, because their liability is limited by statute: *Blodgett* v. *City of Boston* (1864), 8 Allen (Mass.) 237; *Stinson* v. *City of Gardiner* (1856), 42 Me. 248; *McCarthy* v. *City of Portland* (1878), 67 Id. 167; *Tighe* v. *City of Lowell* (1876), 119 Mass. 472; *Lyons* v. *Inhab. Brookline* (1876), Id. 491; *Hunt* v. *City of Salem* (1876), 121 Id. 294; yet the New Hampshire Court, under a similar law, criticises the principle sought to be applied by these cases: *Varney* v. *Manchester* (1878), 58 N. H. 430, 434.

No adjudication discovered by the writer, after a laborious research, has announced any rule or principle, by which the right of children to be and to play upon the sidewalk and street, is governed or controlled. The majority of the cases have gone off on the minor, or subsidiary question, of whether or not the parent has been guilty of negligence; and others, upon the question whether or not the child, though *non sui juris*, has been guilty of negligence; while the minority of the cases place the ruling upon the principle contended for, yet, through all the cases, may be found the proposition that, with respect to children under the age of adult discretion, the defendant should be held liable, if he has failed in any duty.

The rule announced is enforced by the application of fundamental principles:

First. The sidewalk and street is for the use of all persons, children as well as adults, as a matter of right.

Second. In the exercise of one's own right, he must take due care not to interfere with the rights of others, and if he uses any agency or power in the exercise of this right, such as driving a horse, he must use the vigilance and care commensurate with the agency employed, and is therefore liable for any interference with another's right, if it could be avoided by the exercise of due care: *Murphy* v. *Orr* (1884), 96 N. Y. 14; *Barker* v. *Savage* (1871), 45 Id. 191.

Third. Children are required to exercise only such care and prudence as may reasonably be expected from their age and the circumstances of the case; the question being, did the child have the capacity to properly anticipate the danger and guard against it, the defendant being without fault; which is nothing more than the rule in *Lynch* v. *Nurdin* (1841), 1 A. & E. (N. S.) 29; *R. R. Co.* v. *Stout* (1873), 17 Wall. (84 U. S.) 657; *Gray* v. *Scott* (1870), 66 Pa. 345; *Robinson* v. *Cone* (1850), 22 Vt. 213; *Lynch* v. *Smith* (1870), 104 Mass. 52; *Mulligan* v. *Curtis* (1868), 100 Id. 512; *Hicks* v. *R. R. Co.* (1877), 64 Mo. 430; *R. R. Co.* v. *Gladman* (1872), 15 Wall. (82 U. S.) 40; *Kay* v. *R. R. Co.* (1870), 65 Pa. 269; *Manly* v. *R. R.* (1876), 74 N. C. 655; *Mobile & M. Ry. Co.* v. *Crenshaw* (1880), 65 Ala. 566; *Barry* v. *R. R. Co.* (1883), 92 N. Y. 289; *Byrne* v. *R. R. Co.* (1881), 83 N. Y. 620; *Houston & T. C. Ry. Co.* v. *Simpson* (1883), 60 Tex. 103; *G. H. & H. Ry. Co.* v. *Moore* (1883), 59 Tex. 64; *Plumley* v. *Birge* (1878), 124 Mass. 57; *Meibus* v. *Dodge* (1875), 38 Wis. 300; *Chicago & N. W. Ry. Co.* v. *Smith* (1881), 46 Mich. 504.

Fourth. Parents are required to exercise such care as the circumstances of the case and their circumstances in life permit, which, being a question of fact, is for the jury: *Isabel* v. *R. R. Co.* (1875), 60 Mo. 475; *Walters* v. *R. R.*

Co. (1875), 41 Iowa 71; *Pittsburg, A. & M. Ry. Co.* v. *Pearson* (1872), 72 Pa. 169; *P. & R. R. R. Co.* v. *Long* (1874), 75 Id. 257; *Glassy* v. *R. R. Co.* (1868), 57 Id. 172; *O'Flaherty* v. *R. R. Co.* (1869), 45 Mo. 70; *Kay* v. *R. R. Co.* (1870), 65 Pa. 269.

Fifth. A higher degree of care must be exercised towards children, than towards adults: *P. & R. R. R. Co.* v. *Spearen* (1864), 47 Pa. 300; *Smith* v. *O'Connor* (1864), 48 Id. 218; *P. R. R. Co.* v. *Morgan* (1876), 82 Id. 134; *Isabel* v. *R. R. Co.* (1875), 60 Mo. 475; *C. B. & Q. R. R. Co.* v. *Dewey* (1861), 26 Ill. 259; *Bannon* v. *R. R. Co.* (1865), 24 Md. 108; *Walters* v. *R. R. Co.* (1871), 41 Iowa 71; *O'Mara* v. *R. R. Co.* (1868), 38 N. Y. 445; *Singleton* v. *Ry. Co.* (1859), 7 C. B. (N. S.) 287. Because an adult has legal descretion and a child has not; hence due care means the degree of care in proportion to the capacity of the child to anticipate the danger and guard against it; and therefore, due care as to adults, would be gross negligence as to children: *Robinson* v. *Cone* (1850), 22 Vt. 213; *Pittsburg A. & M. R. R. Co.* v. *Caldwell* (1873), 74 Pa. 421; *Lucas, Adm'r,* v. *R. R. Co.* (1856), 6 Gray (Mass.) 71; *Kerr* v. *Forgue* (1870), 54 Ill. 484; *Brannon* v. *R. R. Co.* (1877), 45 Conn. 284; *Walters* v. *R. R. Co.* (1875), 41 Iowa 71; *East Saginaw Ry. Co.* v. *Bohn* (1873), 27 Mich. 503; *Kenyon* v. *R. R. Co.* (1875), 5 Hun (N. Y.) 479; *T. & P. Ry. Co.* v. *O'Donnell* (1882), 58 Tex. 27; *G. C. & S. F. Ry. Co.* v. *Evansich* (1884), 61 Id. 3.

Now if children, *sui juris* or *non sui juris*, have a right on the sidewalk and street (and the adjudications have modified *Hartfield* v. *Roper* to this extent: *McGarry* v. *Loomis* (1875), 63 N. Y. 104; *Karr* v. *Parks* (1879), 40 Cal. 188; *Mangam* v. *R. R. Co.* (1868), 38 N.Y. 455; *Jetter* v. *R. R. Co.* (1866), 2 Keyes (N. Y.) 154; *O'Flaherty* v. *R. R. Co.* (1869), 45 Mo. 70; *Cosgrove* v. *Ogden* (1872), 49 N. Y. 255; *Schierhoed* v. *R. R. Co.* (1871), 40 Cal. 447; *Drew* v. *R. R. Co.* (1862), 26 N. Y. 49; *Lynch* v. *Smith* (1870), 104 Mass. 52; *Ihl* v. *R. R. Co.* (1872), 47 N. Y. 317; *East Saginaw Ry. Co.* v. *Bohn* (1873), 27 Mich. 503; *Bellefontaine & I. R. R. Co.* v. *Snyder* (1868), 18 Ohio St. 399; *McMahon* v. *R. R. Co.* (1873), 39 Md. 438; *Mulligan* v. *Curtis* (1868), 100 Mass. 512); then it is immaterial whether the child is there through the negligence of the parents or not. Being on the sidewalk by right, and only required to exercise the care commensurate with its age and descretion, and the defendant compelled to exercise a higher degree of care towards children than to adults, it follows that, as to children devoid of the sense of danger, or incapable of anticipating danger and guarding against it, there can be no contributory negligence, and the rule is that the defendant is liable, if he could have avoided the injury by the exercise of due care. This the courts have asserted in modification of the rule (in *Hartfield* v. *Roper*): *Baltimore C. P. Ry. Co.* v. *McDonnell* (1875), 43 Md. 556; *McMahon* v. *R. R.* (1873), 39 Id. 439; *Barksdull* v. *R. R. Co.* (1871), 23 La. An. 180, which is substantially the rule in *Davies* v. *Mann* (1842), 10 M. & W. 546, that if a traveler can, by the exercise of ordinary care, avoid doing an injury to something exposed in the highway, he is bound to do it. If such a child is injured, notwithstanding the exercise of due care on the part of the defendant, then there is no cause of action. The child did not contribute, because it was incapable of contributing; the defendant is not liable, because he committed no breach of duty.

In such cases, the sole question is, did the defendant fail to exercise due care? and this the weight of the authorities approve: *Robinson* v. *Cone* (1850), 22

Vt. 213; *N. P. R. R. Co.* v. *Mahony* (1868), 57 Pa. 187; *P. R. R. Co.* v. *Kelly* (1858), 31 Id. 372; *Rauch* v. *Lloyd* (1858), Id. 358; *P. & R. R. R. Co.* v. *Spearen* (1864), 47 Id. 300; *Smith* v. *Connor* (1864), 48 Id. 218; *Glassey* v. *R. R. Co.* (1868), 57 Id. 172; *Kay* v. *R. R. Co.* (1870), 65 Id. 269; *P. & R. R. R. Co.* v. *Long* (1874), 75 Id. 257; *Gov. S. R. R. Co.* v. *Hanlon* (1875), 53 Ala. 70; *Bellefontaine & I. R. R. Co.* v. *Snyder* (1868), 18 Ohio St. 399; *C. C. C. & I. R. R. Co.* v. *Manson* (1876), 30 Id. 451; *Norfolk & P. R. R. Co.* v. *Ormsby* (1876), 27 Grat. (Va.) 455; *Birge* v. *Gardner* (1849), 19 Conn. 507; *Daley* v. *R. R.* (1858), 26 Id. 591; *Bronson* v. *Town of Southbury* (1870), 37 Id. 199; *Boland* v. *R. R. Co.* (1865), 36 Mo. 484; *Stillson* v. *R. R. Co.* (1878), 67 Id. 671; *Frick* v. *R. R. Co.* (1882), 75 Id. 542; *Huff* v. *Ames* (1884), 16 Neb. 139; *Whirley* v. *Whiteman* (1858), 1 Head (Tenn.) 610; *G. H. & H. Ry. Co.* v. *Moore* (1883), 59 Tex. 64; *T. & P. Ry. Co.* v. *O'Donnell* (1882), 58 Id. 27; *H. & T. C. Ry. Co.* v. *Simpson* (1883), 60 Id. 103; *T. M. Ry. Co. et al.* v. *Herbeck* (1884), 60 Id. 602.

According to the adjudications, this rule does not apply to children injured by the negligence of the parent, while in the actual custody and control of such parent: *N. P. R. R. Co.* v. *Mahony* (1868), 57 Pa. 187; *Holly* v. *Gas Co.* (1857), 8 Gray (Mass.) 123; *Pittsburg, A. & M. R. R. Co.* v. *Caldwell* (1873), 74 Pa. 421; *Bellefonte & I. R. R. Co.* v. *Snyder* (1868), 18 Ohio St. 399; *East Saginaw C. Ry. Co.* v. *Bohn* (1873), 27 Mich. 503; *Stillson* v. *R. R. Co.* (1878), 67 Mo. 671; *Lannen* v. *Gas Co.* (1865), 46 Barb. (N.Y.) 264; *R. R.* v. *Stratton*, 76 Ill. 38; *Carter* v. *Towne* (1868), 98 Mass. 567; *Morrison* v. *R. R. Co.* (1874), 56 N. Y. 302; though it is difficult to understand what inherent reason can exist for excusing a defendant who has committed a breach of duty, because the parent was negligent, notwithstanding the injury would not have occurred had the defendant exercised due care.

With respect to children *sui juris*, the rule in *Lynch* v. *Nurdin*, and not the rule applicable to children *non sui juris*, applies, because they are capable of exercising discretion, and of recognizing danger and providing against it, but only in proportion to their age and prudence.

As stated above, a higher degree of care must be used towards children than adults, because of the smaller degree of judgment and discretion possessed by children; hence, if ordinary care is required with respect to adults, it follows that extraordinary care must be exercised towards children, and, therefore, the sole question would be, did the defendant exercise this due care? If he did not, he should be held liable. If he did, he is not liable. If, on the one hand, the child is only required to exercise the care which may be expected from his age and intelligence, and, on the other, the defendant must exercise extraordinary care—or a higher degree of care than ordinary care—it is difficult to understand why a defendant who has failed to exercise the care which the law demands, and thereby caused the injury, should be exempt from liability, when a child, capable of exercising childish care, has failed or forgotten to use that care. As a matter of reason and nature, the omission of a child to exercise childish care, ought not to be allowed to excuse the want of due care in an adult.

The rule in *Lynch* v. *Nurdin* does not extend to the question whether, or not, the child exercised the care expected from one of his age and judgment, but is based entirely upon the question, Did the defendant exercise due care? Hence, due care required

him not to leave his horse and cart unhitched and unattended in the street, where children might get hurt by playing with or about it: *Lynch* v. *Nurdin* (1841), 1 A. & E. (N. S.) 29; *Clark* v. *Chambers* (1878), L. R., 3 Q. B. Div. 327.

And that he do not leave his turntables unguarded and unlocked in a place likely to attract children, even upon his own ground: *R. R. Co.* v. *Stout* (1873), 17 Wall. (84 U. S.) 657; s. c. 2 Dill. (U. S. C. Ct., Dist. Neb.) 294.

Nor leave a tilted bulkhead so exposed on the sidewalk, that a child may throw it over and suffer injury: *Birge* v. *Gardner* (1849), 19 Conn. 507.

Nor pile lumber in such a place, and in such a way, as to fall on children should they play upon it: *Cosgrove* v. *Ogden* (1872), 49 N. Y. 255; *McAlpin* v. *Powell* (1878), 55 How. Pr. (N. Y.) 163; *Venderbeck* v. *Hendry* (1871), 34 N. J. L. 467.

Nor use dangerous or hazardous instrumentalities, exposed where children may get at them: *Boland* v. *R. R. Co.* (1865), 36 Mo. 484; *Wood* v. *School Dist.* (1876), 44 Iowa 27; *Lyons* v. *Inhab. Brookline* (1876), 119 Mass. 491; *Kerr* v. *Forgue* (1870), 54 Ill. 482; *Keffe* v. *R. R. Co.* (1875), 21 Minn. 207; *Nagle* v. *R. R. Co.* (1882), 75 Mo. 653; *Kansas C. Ry. Co.* v. *Fitzsimmons* (1879), 22 Kan. 686; *Koons* v. *R. R. Co.* (1877), 65 Mo. 592.

Nor expose on his premises, or where children may, or are, likely to resort, or be attracted, any dangerous tool, or machine, or contrivance: *Stout* v. *Sioux City & P. R. R. Co.* (1872), U. S. C. Ct., Dist. Neb., 2 Dill. 294; *R. R. Co.* v. *Stout* (1873), 17 Wall. (84 U. S.) 657; only questioned in *St. L. V. & T. H. R. R. Co.* v. *Bell* (1876), 81 Ill. 76; *McAlpin* v. *Powell* (1877), 70 N. Y. 126; and rejected in *Lane* v. *Atlantic Works* (1872), 111 Mass. 136; *Hughes* v. *Macfie* (1863), 2 H. & C. 744; *Mangan* v. *Atterton* (1866), L. R. 1 Ex. 239.

This proper rule has been carried so far that, where children were injured while playing on a railroad track, the defendant was held liable if the injury could have been avoided: *Morrissey* v. *R. R. Co.* (1879), 126 Mass. 377; *Eckert* v. *R. R. Co.* (1871), 43 N. Y. 502; *Central Br. U. P. R. R. Co.* v. *Henigh* (1880), 23 Kan. 347; *Smith* v. *R. R. Co.* (1881), 25 Id. 738.

In conclusion, it is believed to be the rule that, for injuries to children, *sui juris* or *non sui juris*, while on the sidewalk or street, whether at play or not, to hold the defendant liable, if he has failed to exercise the care required, irrespective of any other question.

JOHN F. KELLY.

St. Paul, Minn.

Supreme Court of Illinois.

PATRICK J. SEXTON, *Appellant,*

v.

CHICAGO STORAGE CO. ET AL., *Appellees.*

A transfer by a tenant, of the demised premises, for the unexpired residue of his term, is an assignment, making the assignee liable to the original lessor for rent, though the instrument of transfer purports to be a lease, reserves a different rent from that specified in the original lease, with right of re-entry and forfeiture for non-payment, and provides for surrender of the premises to the original lessee.

The fact that the original lessor has refused to release his lessee from liability for rent, and to accept the rent reserved in the assignment, does not estop him from treating the transfer as an assignment.

That an assignment of a lease was made without the written assent of the lessor, in violation of the provisions of the lease, is no defence to a suit by the lessor against the assignee for rent.

Appeal from Appellate Court, first district.

On May 1, 1885, Patrick J. Sexton leased to Frank F. Cole, by two separate leases, for different parts of the building, a certain warehouse in Chicago, for the term of three years, at a rent of $466.66 per month. Nine days later Cole leased this warehouse to the Chicago Storage Company, for the whole of his unexpired term, at a rental of $300 per month for the first year, $500 per month for the second year, and $650 per month for the third year, with right of re-entry and forfeiture for non-payment of rent, and a covenant by the company to surrender possession to him, at the expiration of the term, or sooner determination of the lease. Sexton treated this second lease as an assignment, demanded rent from the company at the rate of $466.66 per month, and, on its non-payment, brought this suit against the corporation and its stockholders, to dissolve the corporation for having ceased to do business, leaving debts unpaid. The Superior Court and the Appellate Court both held the conveyance from Cole to the company to be a sub-lease, and dismissed the bill for want of equity, because the defendants were not indebted to complainant.

Alexander S. Bradley (*John N. Jewett* and *Jewett Bros.*, of counsel), for appellant.

Kenneth R. Smoot and *Monk & Elliott*, for appellees.

SCHOLFIELD, J., June 15, 1889. The evidence sufficiently proves that "the Chicago Storage Company has ceased doing business." This is not contested by counsel for appellees, though they seek to avoid its effect by the circumstance which they claim to be proved, that such failure is solely because of the seizure and appropriation of its property for the payment of rent due from Frank F. Cole alone to appellant. It is therefore manifest that, in determining whether the corporation has left debts unpaid, so as to bring the case within section 25, c. 32, Rev. Stat. 1874, as amended by the Act of May 22, 1877, in relation to corporations (Laws 1877, p. 66), the first and most important question is, whether the Storage Company is an assignee of the term of Frank F. Cole, or only a sub-lessee under him, for, if it is an assignee of the term of Frank F. Cole, it stands in his shoes as respects his covenant to pay rent, and its property is liable to be seized and appropriated to the payment of the rent by distress, as was done. If, however, it is but a sub-lessee under Frank F. Cole, it is liable only on its covenants to him.

The leases to Frank F. Cole are "for and during" the terms named, "and until the 1st day of May, 1888." The lease executed by Frank F. Cole to the Chicago Storage Company is of precisely the same premises included by the leases to him, and it is in the identical language of those leases, "for and during" the term named, "and until the 1st day of May, 1888;" so that the terms all end at the same instant of time. No space of time, however minute, therefore, can by any possibility remain after the term of the Storage Company has ended before the expiration of the term of Cole, in which he could enter upon or accept a surrender of the premises. The general principle, as held by all the authorities, is that, where the lessee assigns his whole estate, without reserving to himself a reversion therein, a privity of estate is at once created between his assignee and the original lessor, and the latter then has a right of action directly against the assignee, on the covenants running with the land, one of which is that to pay rent; but if the lessee sub-lets the premises, reserving or retaining any reversion, however small, the privity of estate between the sub-lessee and the original landlord is not established, and the latter has

no right of action against the former, there being neither privity of contract nor privity of estate between them. The chief difficulty has been in determining what constitutes such reservation of a reversion. The more recent English decisions, and all of the text-books treating of the question, which have been accessible to us, hold that, where all of the lessee's estate is transferred, the instrument will operate as an assignment, notwithstanding that words of devise, instead of assignment, are used, and notwithstanding the reservation of a rent to the grantor, and a right of re-entry on the non-payment of rent, or the non-performance of the other covenants contained in it: 1 Platt, Leases, 1–9, 102; Woodf., Landl. & Ten. (7th Ed.) 211 (11th Ed.), 236; Wood, Landl. & Ten., p. 181, § 90; Tayl., Landl. & Ten. (8th Ed.) 16, note 2; Bac. Abr. tit. "Leases," H 3; 2 Prest. Conv. 124, 125; *Beardman* v. *Wilson* (1868), L. R. 4 C. P. 57; *Doe* v. *Bateman* (1818), 2 B. & Al. 168; *Wollaston* v. *Hakewill* (1841), 3 Scott, N. R. 593. Undoubtedly many cases may be found wherein the lessee has granted to another party his entire term, retaining no reversionary interest in himself; and it has been held that the relation, as between the parties, was that of landlord and tenant, or, perhaps more correctly, lessee and sub-lessee, because such was clearly the intention of the parties; but this was the result of contract only, and not conclusive upon the original landlord, since he was not a party to it. The relation of landlord and assignee of a term, however, it has been seen, does not result from contract, but from privity of estate, and therefore, when the original lessee has divested himself of his entire term, and thus ceased to be in privity of estate with the original landlord, the person to whom he has transferred that entire term must necessarily be in privity of estate with his original landlord, and hence liable as assignee of the term: See Wood, Landl. & Ten. 182, and authorities cited in note 1; *Van Rensselaer* v. *Hays* (1839), 19 N. Y. 68; *Pluck* v. *Digges* (1831), 5 Bligh (N. S.) 31; *Thorn* v. *Woollcombe* (1832), 3 B. & Ad. 586; *Carpenters' Union* v. *Railway Co.* (1873), 45 Ind. 281; *Smiley* v. *Van Winkle* (1856), 6 Cal. 605; *Blumenberg* v. *Myres* (1867), 32 Id. 93; *Schilling* v. *Holmes* (1863), 23 Id. 227.

Counsel for appellees contend, and the Courts below ruled

accordingly, that the reservation of a new and different rent, or the reservation to the lessor of the right to declare the lease void for the non-performance of its covenants, and to re-enter for such breach, or at the end of the term, coupled with the covenant of the lessee to surrender at the end of the term or upon forfeiture of the term for breach of covenant, make the letting by the lessee a sub-letting and not an assignment of the term, notwithstanding the lessee has retained in himself no part of the term; and they rely upon *Collins* v. *Hasbrouck* (1874), 56 N. Y. 157; *Ganson* v. *Tifft* (1877), 71 Id. 48; *McNeil* v. *Kendall* (1880), 128 Mass. 245; and *Dunlap* v. *Bullard* (1881), 131 Id. 161,—as sustaining this contention. There is general language in *Collins* v. *Hasbrouck* quite as broad as claimed; but no question therein presented called for its use, and its meaning ought to be limited by the facts to which it was applied. There, the first original lease was for the term of 10 years from the 1st of April, 1864; the second was for the term of 9 years from the 1st of April, 1865. Thus both expired April 1, 1874. The sub-lease was for the term of two years and seven months from the 1st of September, 1867,—that is to say, until the 1st of April, 1870,—with the privilege, however, to the lessee to extend the term four years, or until April 1, 1874, by giving two months' notice, etc. The plaintiff claimed that the leases were forfeited by the sub-letting, and the Court so held. No distinction was taken, in the opinion of the Court, between an absolute demise until the end of the term and a mere privilege to have the demise extended four years, which was until the end of the term. We have held that a similar clause in a lease is not a present demise, but a mere covenant, which may be specifically enforced in chancery, or upon which an action at law may be maintained for a breach of covenant: *Hunter* v. *Silvers* (1853), 15 Ill. 174; *Sutherland* v. *Goodnow* (1884), 108 Id. 528. And it would seem quite evident that, in no view, could the reversion have passed until after the grantee elected to have the term for four years longer; and so, when the lease was executed, there was still a reversionary interest in the sub-lessor of four years, subject, though it may have been, to be thereafter divested by the election of the sub-lessee. In *Ganson* v. *Tifft*, the sub-lease provided that,

at the expiration of the term, or other sooner determination of the demise, the lessee should surrender the demised premises to the lessors, and the Court said: "This constitutes a sub-lease of the premises, and not an assignment of the term." In *Stewart* v. *Railroad Co.* (1886), 102 N. Y. 601, there was a demise by the lessee to the Long Island Railroad Company for a term longer than that held by the lessee. There was also a different rent to be paid than that provided to be paid by the original lease, and there was a reservation of the right to re-enter for non-payment of rent, etc. It was held that, as to the original landlord, this amounted to an assignment of the lease, and that its character was not destroyed by the reservation therein of a new rent to the assignor with a power of re-entering for non-payment of rent, or by its assumption of the character of a sub-lease. The Court, after laying down the rule substantially as we have heretofore stated it to be recognized by the text-books and recent English decisions, said:

"The effect, therefore, of a demise by a lessee for a period equal to or exceeding his whole term is to divest him of any reversionary right and render his lessee liable, as assignee, to the original lessor, but at the same time the relation of landlord and tenant is created between the parties to the second demise, if they so intended."

Citing Tayl., Landl. & Ten. (7th Ed.) § 109, note; Id. § 16, note 5; 1 Washb., Real Prop. (4th Ed.) 515, note 6; *Adams* v. *Beach* (1850), 1 Phila. (Pa.) 99; *Carpenters' Union* v. *Railway Co.* (1873), 45 Ind. 281; *Lee* v. *Payne* (1856), 4 Mich. 106; *Lloyd* v. *Cozens* (1830), 2 Ashm. (Pa.) 13; Wood, Landl. & Ten. (Banks' Ed.) 347,—and then adding: "These rules are fully recognized in this State: *Prescott* v. *De Forest* (1819), 16 Johns. (N. Y.) 159; *Bedford* v. *Terhune* (1864), 30 N. Y. 457; *Davis* v. *Morris* (1867), 36 Id. 569; *Woodhull* v. *Rosenthal* (1875), 61 Id. 382, 391, 392." In speaking of the ruling in *Collins* v. *Hasbrouck*, *supra*, after stating the facts, the Court said:

"In the opinion, the question is discussed whether the sub-lease amounted to an assignment of the term of the original lease, or a mere sub-letting or re-letting of part of the demised premises. This question, in view of the result reached on the question of waiver, ceased to be controlling; but, in discussing it, the learned judge delivering the opinion made some remarks touching the effect of reserving a new rent in the sub-lease, and of reserving to the original lessee a right of re-entry for a breach of condition by his lessee, which have given rise to some confusion. The features of the instrument, which are above referred to, would be proper sub-

jects of consideration for the purpose of determining whether the relation of landlord and tenant was created as between the original lessee and his lessee, and bore upon the question then before the Court, viz., whether the second lease was a subletting or re-letting of part of the demised premises, which constituted a breach of the covenant not to sub-let or re-let. But the question of privity of estate between the original lessor and the lessee of his lessee was not in the case. The determination of the question depends upon whether the whole of the term of the original lessee became vested in his lessee, and the circumstances that the second lease reserves a different rent or a right to entry for breach of condition are immaterial."

And, after quoting many authorities to sustain that position, the opinion proceeds:

"The cases which hold, that where a lessee sub-leases the demised premises for the whole of his term, but his lessee covenants to surrender to him at the end of the term, the sub-lease does not operate as an assignment, proceed upon the theory that, by reason of this covenant to surrender, some fragment of the term remains in the original lessor. In most of the cases, and in the earlier cases in which this doctrine was broached, the language of the covenant was that the sub-lessee would surrender the demised premises on the last day of the term."

It is true that in this case, as has been before stated, the lessee demised for a number of years beyond the term for which he held; but it is impossible that, upon principle, there can be any difference between a demise of an entire term, which can leave no possible space of time remaining in the lessor, and a demise for any additional time beyond the term; for, since no one can demise what he does not have, all that can pass by the demise, in the latter instance, is the entire term of the lessor. If, here, the demise of Frank F. Cole vests his entire interest in the property, as it professes to do, "for and during" the remainder of his term, "and until the 1st day of May, 1888," it cannot be that any portion, however short in duration, of the term granted him by the leases of appellant, remained in him, because they are limited by the same words precisely, namely, "for and during" the term, "and until the 1st day of May, 1888." In *McNeil* v. *Kendall* (1880), 128 Mass. 245, there were easements reserved from the effect of the lease. In *Dunlap* v. *Bullard* (1881), 131 Id. 161, however, the facts are analogous in principle to those here involved; and it was held that the demise of the entire term of the lessee was a sub-lease and not an assignment, because of the right reserved in the lease for the lessor to re-enter and resume possession for a breach of the covenants. But this is

held upon the ground that, under the decisions of that Court, the right to re-enter and forfeit the lease is a contingent reversionary estate in the property; the Court having previously held, in *Austin* v. *Parish* (1838), 21 Pick. (Mass.) 215–223, and *Church* v. *Grant* (1855), 3 Gray (Mass.) 142–147, that, where an estate is conveyed to be held by the grantee upon a condition subsequent, there is left in the grantor a contingent reversionary interest, which is an estate capable of devise. It has been suggested that these decisions are predicated upon a local statute, (see Tied., Real Prop. note 1, p. 117, and note 1, p. 904, 6 Amer. & Eng. Cyclop. Law.), but whether this be true or not, the decisions are plainly contrary to the principles of the common law. The right to enter for breach of condition subsequent could not be alienated, as it could have been had it been an estate; and Coke says: "The reason hereof is for avoiding of maintenance, suppression of right, and stirring up of suits; and therefore nothing in action, entry or re-entry can be granted over:" Co. Litt. § 347 (214*a*). See, also, 1 Com. Dig. tit. "Assignment," C 2, p. 688; 3 Com. Dig. tit. "Condition," O 1, p. 124; 4 Kent, Comm. (8th Ed.) 126, 123; 1 Prest. Est. 20, 21; Shep. Touch. 117, 121. It is said in 1 Washb., Real Prop. (2d Ed.) 474, 451:

"Such a right [*i. e.*, to enter for breach of condition subsequent] is not a reversion, nor is it an estate in land. It is a mere chose in action, and, when enforced, the grantor is in by the forfeiture of the condition, and not by the reverter."

To like effect is, also, Tied., Real Prop. § 277; 6 Amer. & Eng. Cyclop. Law, 903; Tayl., Landl. & Ten. (8th Ed. § 293; *Southard* v. *Railroad Co.* (1856), 26 N. J. L., 13, 21; *Webster* v. *Cooper* (1852), 14 How. (55 U. S.) 488, 501; *Schulenberg* v. *Harriman* (1874), 21 Wall. (88 U. S.), 44, 63; *Nicoll* v. *Railroad Co.* (1854), 12 N. Y. 121.

It is true that, by section 14 of our statute in relation to landlord and tenant (Rev. St. 1874, p. 659):

"The grantees of any demised lands, tenements, rents, or other hereditaments, or of the reversion thereof, the assignees of the lessor of any demise, and the heirs and personal representatives of the lessor, grantee, or assignee, shall have the same remedies, by entry, action, or otherwise, for the non-performance of any agreement in the lease, or for the recovery of any rent, or for the doing of any waste or other cause of forfeiture, as their grantor or lessor might have had if such reversion had remained in such lessor or grantor."

But this does not make what was before but a chose in action an estate. The right to enter for breach of covenant is still but a remedy for enforcing performance of a contract which may be defeated by tender: Tayl., Land. & Ten. (8th Ed.) 302. As is said by the Court in *De Peyster* v. *Michael* (1852), 6 N. Y. 467, 507, in speaking of the effect of a like statute of New York: "The statute only authorized the transfer of the right, and did not convert it into a reversionary interest, nor into any other estate." See, also, *Nicoll* v. *Railroad Co.* (1854), 12 N. Y. 121, at p. 139. It follows that, in our opinion, the rule assumed to be followed in *Collins* v. *Hasbrouck*, *Ganson* v. *Tifft*, and *Dunlap* v. *Bullard*, *supra*, is not in conformity with the common law, and that it cannot, therefore, be applied here.

The objection, that the written assent of appellant was not obtained to the assignment, cannot be urged by appellees. The clause in the leases, in that respect, is for the benefit of, and can be set up by appellant alone. He may waive it if he will; and, if he does not choose to set it up, no one else can: *Webster* v. *Nichols* (1882), 104 Ill. 160; *Willoughby* v. *Lawrence* (1886), 116 Id. 11; *Arnsby* v. *Woodward* (1827), 6 B. & C. 519; *Rede* v. *Farr* (1817), 6 M. & S. 121.

But counsel insist that appellant is estopped, by his conduct, to now allege that the instrument executed by Frank F. Cole is an assignment. We have carefully considered the evidence bearing upon this question, and we are unable to concur in this view. Appellant did refuse to acquiesce in the construction placed by appellees upon the lease of Frank F. Cole, and to settle with them upon that basis. He refused to release Frank F. Cole and accept the Storage Company alone; and he refused to accept the amount of rent which the Storage Company obligated itself to pay Frank F. Cole as a satisfaction of Frank F. Cole's covenant to pay rent to him; but he was all the time willing that the Storage Company should remain in possession, provided the rent due him by his lease to Frank F. Cole was paid to him. He knew the terms of the lease of Frank F. Cole to the Storage Company, and he afterwards received rent from it, and permitted it to remain in possession. The lessee continues, notwithstanding the assignment, liable upon his express covenant to pay rent; and the assignee be-

comes liable upon the same covenant, by reason of his privity of estate, because that covenant runs with the land: Tayl., Landl. & Ten. (8th Ed.), § 438; 2 Platt, Leases, 356; *Walton* v. *Cronly* (1835), 14 Wend. (N. Y.) 63; *Bailey* v. *Wells* (1859), 8 Wis. 141. Since appellant might sue Cole, on his express covenant to pay rent, and, he having fled the State, take out an attachment in aid thereof, we perceive no reason why he might not at the same time take garnishee process against the Storage Company, and recover any debt which it owed him. There is certainly nothing in this inconsistent with his ultimately enforcing his liability against that company as assignee of Cole's term. It is not shown that the Storage Company has been, by anything done or said by appellant, induced to do to its prejudice anything that it would not otherwise have done. No judgment has been recovered against it, as garnishee of Frank F. Cole, for rent due from it to Frank F. Cole, nor does it appear, otherwise, to have been compelled to pay money or incur liability by reason of any act or word of appellant proceeding upon the recognition of its being liable to Frank F. Cole, as such lessee, only.

For the reasons given, the decree of the Superior Court, and the judgment of the Appellate Court, are reversed, and the cause is remanded to the Superior Court for further proceedings consistent with this opinion.

The distinction between a sub-lease and an assignment, is a fundamental one, based upon principles of the feudal law, and is wholly independent of the form of the conveyance: whether this purports to be a sub-lease, or an assignment, is immaterial: *Thorn* v. *Woollcombe* (1832), 3 B. & Ad. 586, 595; *Bedford* v. *Terhune* (1864), 30 N. Y. 453; *McNeil* v. *Kendall* (1880), 128 Mass. 245, 251.

Under the feudal system, the owner of a fee could not substitute another in his place, without his lord's consent. This restriction on alienation was avoided by the practice of sub-infeudation, by which the tenant granted the land to be held of him as he held it of his lord, thus making the tenant an intermediate landlord. The Statute of *Quia Emptores*, 18 Edw. I., c. 1, put an end to sub-infeudation, so far as estates in fee were concerned, and, accordingly, wherever that statute is in force, it is possible to become a landlord only by granting an estate less than a fee, and thus retaining a reversion: *Van Rensselaer* v. *Dennison* (1866), 35 N. Y. 393, 400.

Estates for years, being only chattel interests, were not included in the feudal restrictions against alienation, nor did they come within the purview of this statute: 1 Wash., Real Prop. (5th Ed.), 462. Hence terms of years could be sold, even before the Statute of *Quia*

Emptores; while in regard to them sub-infeudation can still be practised.

The difference between alienation and sub-infeudation, is the basis of the distinction between an assignment and a sub-letting, in the present law of landlord and tenant.

Although this distinction is of so radical a nature, it is sometimes difficult to determine whether a particular conveyance is a sub lease or an assignment. In such cases, the test to be applied is this: Does the original lessee retain a reversion? In order to retain a reversion, the estate he grants must be smaller than his. Thus, a sub-lease creates a new estate, while an assignment merely transfers an existing estate into new hands: Comyn, Landl. & Ten. 51, 52.

The transfers which have been found most difficult to classify, are those in which, as in the principal case, the lessee conveys the land for the entire residue of his term, reserving an additional, or different rent, with a right of re-entry and forfeiture for its non-payment, and exacting a covenant to surrender possession to him, at the expiration of the term, or sooner determination of the lease. There are some decisions to the effect that such an instrument is a sub-lease: *United States* v. *Hickey* (1873), 17 Wall. (84 U. S.) 13; *Dunlap* v. *Bullard* (1881), 131 Mass. 161: *Collamer* v. *Kelley* (1861), 12 Iowa 319, 322; *Collins* v. *Hasbrouck* (1874), 56 N. Y. 157, 161; but the greater number of authorities, both English and American, hold it to be an assignment: *Wollaston* v. *Hakewell* (1841), 3 M. & G. 297, 322; *Beardman* v. *Wilson* (1868), L. R. 4 C. P. 57; *Doe* v. *Bateman* (1818), 2 B. & Al. 168; *Smith* v. *Mapleback* (1786), 1 T. R. 441; *Hicks* v. *Downing* (1796), 1 Ld. Ray. 99; Bacon's Abr. Leases I, 3; *Bedford* v. *Terhune* (1864), 30 N. Y. 453; *Woodhull* v. *Rosenthal* (1875), 61 Id. 382, 391; *Lloyd* v. *Cozens* (1830), 2 Ashm. (Pa.) 131; *Palmer* v. *Edwards* (1783), 1 Doug. 187; *Smiley* v. *Van Winkle* (1856), 6 Cal. 605.

In order to make the transaction anything but an assignment, the estate granted must differ from that held by the lessee, either in kind, or in degree. But as it runs for the same length of time as the other, it cannot differ from it in degree. Nor does it differ in kind. True, it is burdened with a new rent, but that does not change its character. If a man buys land, allows another to acquire a right of way over it, and then sells the land, the estate he sells, though subject to an easement, is the same one that he bought, since a right of way confers no interest in the land: *Garrison* v. *Rudd* (1858), 19 Ill. 558, 564. So, the assignee's estate, though burdened with a new rent (which is an incorporeal hereditament, like a right of way), is the very estate held by the lessee. Thus, too, it has been held that a conveyance of land, to one and his heirs, reserving a perpetual rent, gives the grantee a fee simple,—the same estate as that of his grantor: *De Peyster* v. *Michael* (1852), 6 N. Y. 467.

Nor does the condition of re-entry and forfeiture change the nature of the estate transferred. Thus, though the sale is a conditional one, it is none the less a sale. If one sells a piano or other chattel, to be paid for in monthly instalments upon the condition, that on failure to pay any instalment, the title shall revert to the seller, this certainly is a sale and not a hiring: *Latham* v. *Sumner* (1878), 89 Ill. 233: *Lucas* v. *Campbell* (1878), 88 Id. 447. If land is sold upon condition subsequent, the vendee takes a fee, though his estate is liable to be divested on the happening of the condition: *Nicholl* v. *N. Y. & E. R. R. Co.* (1854), 12 N. Y. 121, 132. The principle is the same in sales of terms of years.

So, too, a mortgagee of the term, in

possession, is held to be an assignee, though his estate is at most an estate upon condition: *Astor* v. *Hoyt* (1830), 5 Wend. (N. Y.) 617; *Williams* v. *Bosanquet* (1819), 1 B. & B. 238.

As to the covenant to surrender the premises to the lessee, it seems to be settled in New York, that the insertion of this clause makes the instrument a sub-lease: *Post* v. *Kearney* (1849), 2 N. Y. 396: *Collins* v. *Hasbrouck* (1874), 56 Id. 157, 161; *Ganson* v. *Tifft* (1877), 71 Id. 48, 54; except when the lessee attempts to transfer the land for a term longer than his own: *Stewart* v. *Long Island R. R. Co.* (1886), 102 Id. 601. These cases proceed upon the theory that the covenant to surrender gives the lessee a reversion of an infinitesimal space of time on the last day of the term. But this theory does not seem to prevail elsewhere.

All the interest the lessee retains in the land, after such a transfer, is a rent charge, with a right of re-entry for non-payment: *Pluck* v. *Digges* (1831), 5 Bligh, N. S. 42; *Parmenter* v. *Webber* (1818), 8 Taun. 593. But a rent charge is not an estate: *Langford* v. *Selmes* (1857), 3 K. & J. 220, 228; *Payn* v. *Beal* (1847), 4 Denio (N. Y.) 405, 412; *Van Rensselaer* v. *Dennison* (1866), 35 N. Y. 393, 400; nor, a right of re-entry, a reversion: *De Peyster* v. *Michael* (1852), 6 Id. 506. If then, the lessee retains no estate himself, he must have done more than carve a smaller estate out of his; and the transaction is clearly an assignment.

As to the rights and duties of assignees and sub-lessees respectively, the decisions are more harmonious. Sub-lessee and assignee are both tenants, the former of the lessee: *Langford* v. *Selmes* (1857), 3 K. & J. 228; the latter of the reversioner: *Sanders* v. *Partridge* (1871), 108 Mass. 556. The assignee stands in privity of estate with the reversioner: *Walker's Case* (1587), 3 Rep. 22; *Borland's Appeal* (1870), 66 Pa. 470; *Lester* v. *Hardesty* (1868), 29 Md. 50; *Donelson* v. *Polk* (1885), 64 Id. 501; *Salisbury* v. *Shirley* (1884), 66 Cal. 223. The sub-lessee has with him no privity whatever: *McFarlan* v. *Watson* (1850), 3 N. Y. 286; *Bailey* v. *Richardson* (1885), 66 Cal. 416, 421; *Gibson* v. *Mullican* (1883), 58 Tex. 430, 432.

Each can take emblements, if his estate is unexpectedly determined without his fault: 1 Cruise Dig. 271; even though it be on account of the act, or omission, of the lessee himself: *Oland* v. *Burdwick* (1596), Cro. Eliz. 460; unless it be determined by the foreclosure of a mortgage made before the lease: *Lynde* v. *Rowe* (1866), 12 Allen. (Mass.) 100.

The sub-lessee cannot dispute the lessee's title, because the latter is his landlord: *Tilghman* v. *Little* (1851), 13 Ill. 239; nor the lessor's, because the lessee, under whom he holds, could not: *Lee* v. *Payne* (1856), 4 Mich. 106, 117; *Doty* v. *Burdick* (1876), 83 Ill. 473. The assignee cannot dispute the title of the lessor, who is his landlord: *Carter* v. *Marshall* (1874), 72 Ill. 609; *Green* v. *Wilson* (1887), Ct. App. Ky.; but may dispute that of the lessee, who is merely his vendor: *Blight's Lessee* v. *Rochester* (1822), 7 Wheat. (20 U. S.) 534, 548.

An acceptance, by the lessor, of the assignee, as his tenant, while it leaves the lessee still liable on his express covenants: *Ghegan* v. *Young* (1854), 23 Pa. 18; *Wilson* v. *Gerhardt* (1886), 9 Colo. 585; *Oswald* v. *Fratenburgh* (1886), 36 Minn. 270; frees him from his implied covenants, in whole, or in part, according to the extent of the assignment: *Walker's Case* (1587), 3 Rep. 22. But no recognition of the sub-lessee by the original lessor releases the lessee from any of his obligations.

Both assignee and sub-lessee, being